Office-Supreme Court, U.S.
FILED
APR 3 1981
ALEXANDER L. STEVAS,
CLERK

80-1673
No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

JEFFREY E. FREDERIKSEN and EMERALD CITY CORPORATION, an Illinois corporation,

Petitioners,

v.

EDWARD T. POLOWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARK H. SCHIFF
123 West Madison Street
22nd Floor
Chicago, Illinois 60602
Tele: (312) 782-8400
Counsel of Record

Of Counsel:
PAUL BERNSTEIN
123 West Madison Street
Chicago, Illinois 60602
Tele: (312) 782-8400

Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

Whether (a) fraud charged in connection with the purchase of stock and substantially all of the assets of a corporation involves the sale of a "security" within the scope of the federal securities laws, and (b) an economic reality examination is required for purposes of a motion to dismiss the Petitioner's complaint.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Reference to Official Report	v
Grounds on which Supreme Court Jurisdiction is Invoked	v
Statutes Involved	vi
Statement of the Case	1
Argument	5
Appendix	App. 1

TABLE OF AUTHORITIES

Cases

Alberto-Culver Company v. Scherk, 484 F.2d 611 (7th Cir. 1973), *rev'd on other grounds* 417 U.S. 506 (1974) 6, 7, 8, 9

Burns v. Paddock, 503 F.2d 18 (7th Cir. 1974) 17

Chandler v. Kew, Inc. (1979) Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 96,966 (10th Cir. 1977) 14, 15

Coffin v. Polishing Machines, Inc., 596 F.2d 1202 (4th Cir. 1979) 6, 10, 11, 12, 14, 17, 20

PRECEDING PAGE WAS BLANK

PAGE

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957) 17

Cruz v. Beto, 405 U.S. 319 (1972) 17

Frederiksen v. Poloway, 637 F.2d 1147 (7th Cir. 1981) 14

Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978) 9

Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1973) 19

Mifflin Energy Sources, Inc. v. Brooks, (1980) Fed. Sec. I. Rep. Transfer Binder (CCH) ¶ 97,734 (D.Ct. Penn. 1980) 12, 13, 14, 15

Occidental Life Insurance Company of No. C. v. Pat Ryan and Assoc., Inc., 496 F.2d 1255 (4th Cir. 1974) 7, 8, 11

S.E.C. v. Glenn W. Turner Enterprises, 474 F.2d 476 (9th Cir. 1973) cert. denied, 414 U.S. 821 (1973) 19

S.E.C. v. Howey, 328 U.S. 293 (1946) 5, 9, 10, 11

Scheuer v. Rhodes, 416 U.S. 232 (1974) 17

Supt. of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6 (1971) 8

Tcherepnin v. Knight 389 U.S. 332 (1967) 5, 8, 9, 10

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 6, 8, 9, 10, 11, 13, 14, 18, 19, 20

Weaver v. Marine Bank, (1980) Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 97,727 (3rd Cir. December 15, 1980) 15, 16

REFERENCE TO OFFICIAL REPORTER

The opinion of the United States Court of Appeals for the Seventh Circuit is found at 637 F.2d 1147 (7th Cir. 1981).

GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

(i) The date of the opinion of the United States Court of Appeals for the Seventh Circuit is January 9, 1981.

(ii) The jurisdiction conferred upon this Court to review the judgment in question by Writ of Certiorari is based upon 28 U.S.C. §1254(1) and United States Supreme Court Rule 20.2.

STATUTES INVOLVED

1. §2(1) of the Securities Act of 1933, 15 U.S.C. §77(b)(1) provides:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

2. §3(a)(10) of Securities Exchange Act of 1934, 15 U.S.C. §78(c)(a)(10) provides:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

In the
Supreme Court of the United States

OCTOBER TERM, 1981

NO.

JEFFREY E. FREDERIKSEN and EMERALD CITY CORPORATION, an Illinois corporation,

Petitioners,

v.

EDWARD T. POLOWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

On September 17, 1979, Petitioners filed their complaint in the United States District Court for the Northern District of Illinois, Eastern Division. Through this action, Petitioners have asserted their rights under the federal securities laws, as well as issues under the Illinois Securities Law, a claim for common law fraud and a claim for breach of contract, the last three being before the court pursuant to its pendent jurisdiction.

On November 29, 1979, Respondent filed a Motion to Dismiss the Plaintiff's Complaint for "Failure to State a Cause of Action" alleging that the transaction did not involve a "security" under the federal securities laws. Respondent filed a Memorandum in Support thereof on the same date. On January 3, 1980, Petitioners filed their Memorandum in Response to the Motion to Dismiss the Plaintiff's Complaint. The trial court ruled on February 8, 1980, granting the Respondent's Motion to Dismiss the Plaintiff's Complaint. On March 4, 1980, Petitioners filed a Notice of Appeal. Oral argument was heard on October 31, 1980 before the United States Court of Appeals for the Seventh Circuit and a decision by that Court was issued on January 9, 1981, affirming the judgment of the District Court.

This matter came before the district court's jurisdiction on the basis of Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (1976) and Section 22(a) of the Securities Act of 1933, 15 U.S.C. §77(v)(a) (1976). This matter came before the United States Court of Appeals for the Seventh Circuit pursuant to the final disposition of this matter as set forth in the district court's order of February 8, 1980 dismissing the action and 28 U.S.C. §1291.

THE FACTS

During the months of August through October of 1978, the Petitioners Jeffrey E. Frederiksen (hereinafter "Frederiksen") and Emerald City Corporation, an Illinois corporation (hereinafter "ECC"), entered into negotiations for the purchase of assets and stock of a corporation called North Shore Marine, Inc. (hereinafter "NSM"). NSM was in the business of selling, servicing and providing storage facilities for boats at its location in Waukegan,

Illinois. These negotiations were conducted on behalf of NSM by its president and sole shareholder, Respondent Edward T. Poloway (hereinafter "Poloway"). Poloway had been the sole owner of NSM for a number of years, both as a sole proprietor and later as sole shareholder after incorporation. Poloway had been in the boating business for many years previous to this transaction, and though there were few, if any, books and records of NSM maintained by Poloway, Poloway had assured the Petitioners that the business was not only viable, but had excellent potential for vast growth. Respondent indicated to Petitioners, that NSM was in great debt, and that the Respondent did not have the funds to place the business in a position to grow to its capabilities. Petitioners, on the other hand, had no previous experience in the boating business, but were willing to invest large sums of money in the business, based upon the expectation of profit from Poloway's managerial efforts.

During negotiations, Respondent made certain representations to the Petitioners regarding the value of various assets of NSM including intangible property, inventory and accounts receivable. Respondent had made statements to the Petitioners, such that inferences could be reasonably drawn, that Respondent had not disclosed accurately and completely the financial condition of NSM and its assets and liabilities. Petitioners allege that these representations have subsequently been proven not only to be incorrect, but that Respondent knew that such representations were incorrect when made.

On October 14, 1978, Petitioners signed a number of agreements with the Respondent Edward T. Poloway, in Poloway's capacity as sole shareholder of NSM, as President of NSM, and in his individual capacity. The agreements included:

(a) Agreement to purchase immediately 10% of the issued and outstanding shares of NSM by ECC from Poloway and to subsequently cause NSM to redeem the remaining 90% of the stock held by Poloway;

(b) Agreement to purchase assets of NSM by ECC;

(c) Employment agreement between ECC and Poloway;

(d) Management Agreement between ECC and NSM.

The documents show that Petitioners purchased outright 10% of the stock of NSM from Respondent. The remaining 90% of the stock owned by Respondent was held in a voting trust with Petitioner as voting trustee. In order to protect Petitioners from unknown obligations of NSM, Petitioners were then to place $160,000.00 out of a total "asset" purchase price of $191,800.00 in an escrow account to pay obligations of NSM existing as of October 14, 1978. The Agreement to Purchase Stock provides that after all debts of NSM were paid out of the escrow account, the balance of the funds would be paid by NSM to Respondent as the price for redemption of the remaining 90% of the shares of stock held by Respondent. Due to the misrepresentation aforementioned, the Petitioners suffered great financial loss.

ARGUMENT

I. THE FEDERAL CASES ARE IN CONFLICT

A. THIS COURT HAS SET DOWN A TWO-LEVEL TEST FOR DETERMINING WHETHER AN INSTRUMENT IS A "SECURITY" UNDER THE FEDERAL SECURITIES LAWS.

Beginning with *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967), where this Court faced the issue "whether a withdrawable capital share in an Illinois savings and loan association is a 'security' within the meaning of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §78a et seq." 389 U.S. at 332, this Court noted two important considerations in defining a security.

The first is that "form should be disregarded for substance and the emphasis should be on economic reality" *S.E.C.* v. *Howey,* 328 U.S. 293, 298 (1946). The second consideration noted in the *Tcherepnin* case is that "Instruments may be included within any of [the Act's] definitions, as a matter of law, if on their face they answer to the name or description, "[Quoting *S.E.C.* v. *Joiner,* 320 U.S. 344 at 351 (1943)]. 389 U.S. 332 at 339.

If these two principles can be reconciled at all, it appears that this Court has promulgated a two level test in determining whether a transaction involves a "security" under §2(1) of Securities Act of 1933 and §3(a)(10) of the Securities Exchange Act of 1934.

Petitioners assert that where the instruments used in the transaction involve corporate stock, they fall within the literal definition of a security as that term is defined

in the federal securities laws, creating a presumption that the transaction is covered by the securities laws. *See Coffin* v. *Polishing Machines, Inc.*, 596 F.2d 1202 (4th Cir. 1979). While this may not be the only test to be applied where an instrument other than "corporate stock" is involved, if on its face, corporate stock is involved in the transaction, the federal securities laws do apply. That presumption may be rebutted if an "economic reality" examination of the facts as dictated by *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 850-851 (1975) indicates that the instrument does not have the "significant characteristics typically associated with the named instrument". If such is the case, the instrument would not then fall within the definition of a "security". If the evidence produced at trial does not indicate that an instrument is other than a "security" under the economic reality examination, the presumption holds that a "security" is involved.

This approach was followed by the Seventh Circuit in *Alberto-Culver Company* v. *Scherk*, 484 F.2d 611 (7th Cir. 1973) *rev'd on other grounds* 417 U.S. 506 (1974). In that case the Seventh Circuit had before it an agreement between the Plaintiff and the Defendant that a certain corporation owned solely by the Defendant was to sell 100% of the stock of the corporation to the Plaintiff, along with an agreement between Plaintiff and Defendant for the purchase by the Plaintiff of the assets of three companies owned by Defendant. The Plaintiff alleged that it was defrauded in the acquisition of these businesses in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The question of the District Court's jurisdiction to hear the matter was raised involving the issue of whether the transaction involved a "security" within the purview of Section 10(b) of the Securities Exchange

Act of 1934 and Rule 10b-5. The Seventh Circuit concluded that the sale of the shares and assets of the corporations was the sale of a "security" within the purview of the aforementioned rules.

In its analysis, the court stated:

> "As used in the 1933 (Securities Act) and 1934 (Securities Exchange Act) Acts, security 'embodies a flexible rather than a static principle, one that is capable of adaptation to meet countless and variable schemes devised by those who seek the use of money of others on the promise of profits.' (Citation omitted).
>
> "This mandate to construe broadly the term 'security' compels our conclusions that the agreement to incorporate the SEV entity, and to transfer the assets of the SEV, FLS and Lodeva entities in exchange for cash and promissory notes involves a 'security' within the meaning of the Securities Exchange Act of 1934. *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F.2d 662 (2d Cir. 1971); *Lawrence* v. *Securities and Exchange Comm.*, 398 F. 2d 276 (1st Cir. 1968)."

484 F.2d at 615. The Seventh Circuit retained this approach until its decision in the instant case.

In the case of *Occidental Life Insurance Company of No. C.* v. *Pat Ryan and Assoc., Inc.*, 496 F.2d 1255 (4th Cir. 1974), an action involving the sale of all the outstanding shares of an insurance company, the Fourth Circuit held that:

> "[T]he fact that the instruments used in this transaction involve stock and must come within the literal definition of a 'security' creates a strong presumption that the transaction is covered by Section 10(b). It is not necessary for purposes of Section 10(b) that every instrument used in the sale transaction meet the definition of an 'investment contract'."

496 F.2d at 126.

The court quoted the United States Supreme Court in *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967) in stating:

> "instruments may be included within any of (the act's) definitions, as a matter of law if on their face they answer to the name or description."

Clearly, in the case at bar, the sale of stock of NSM falls within the precise definition of a security under Section 3(a)(10) of the Securities Exchange Act of 1934. Therefore, as a matter of law, this transaction falls within the purview of the aforementioned federal securities laws.

Further, in the *Occidental* case, the Fourth Circuit noted that in the sale of certain shares of stock of the corporation there was evidence of fraud in connection with the transfer. In the instant case, there has been no trial in which to present evidence, but on the basis of the facts in the Petitioner's pleadings being taken as admitted for purposes of a motion to dismiss, there is clearly evidence of fraud in connection with a transfer of stock.

The *Occidental* court observed that it did not find persuasive the argument that ordinary commercial transactions should be left to the protection of state laws. In quoting the case of *Supt. of Insurance* v. *Bankers L. and C. Co.,* 404 U.S. 6, 10-12 (1971), the Court noted that Section 10(b) must be read flexibly, not technically and restrictively:

> "Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under Section 10(b), whatever might be available as a remedy under state law."

496 F.2d at 1262. Although the *Alberto-Culver* and *Occidental* cases were decided prior to this Court's decision in *United Housing Foundation, Inc.* v. *Forman, supra,* both

were decided after the *Tcherepnin* and *Howey* cases where the economic reality test for an "investment contract" had its foundation.

In 1975, this Court decided the case of *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837 (1975) and further elaborated the "economic reality" examination to determine whether a "security" was involved in a transaction. *Forman* indicates in part that "the touchstone (of a security) is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others". 421 U.S. at 852. In that case, this Court enunciated the test for determining the existence of an "investment contract" cognizable under the federal securities laws, by noting three elements:

(1) An investment in a common venture

(2) premised on a reasonable expectation of profits

(3) to be derived from the managerial efforts of others. *Id.*

To the same effect is *Goodman* v. *Epstein,* 582 F.2d 388 at 406 (7th Cir. 1978).

In *Forman,* this Court stated further:

> "By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, . . . (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds . . . (dividends on the investment based on savings and loan association's profits). In such cases the investor is 'attracted solely by the prospects of a return' on his investment. By contrast, when a purchaser is motivated by a desire to use or

> consume the item purchased—'to occupy the land or to develop it themselves,' the securities laws do not apply." (Citations omitted).

421 U.S. at 852-853. The Supreme Court in *Forman* also quoted *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) as follows:

> "in searching for the meaning and scope of the word 'security' in the Acts, form should be disregarded for substance and the emphasis should be on economic reality."

Therefore, it would appear that the *Howey, Tcherepnin* and *Forman* cases have created the relevant test to be applied by the federal courts in determining whether a "security" is involved under the federal securities laws. In none of these three major cases where this Court has rendered an opinion involving the question of definition of a "security" was the Court required to apply this test to "ordinary corporate stock." *See Coffin* v. *Polishing Machines, Inc.*, 596 F.2d at 1024.

In *Howey*, this Court faced the issue of whether the sale of units of land in a Florida citrus grove coupled with a management contract for cultivating the crops and remitting the proceeds to the owner constituted an "investment contract" under the Securities Act of 1933.

The *Tcherepnin* case involved, as discussed previously, the question of whether a withdrawable capital share in an Illinois savings and loan association constituted a "security" under the federal securities laws, while *Forman* involved the issue as to whether shares of a cooperative apartment complex are "securities". Petitioners maintain that the difference between the above-mentioned transactions and "ordinary corporate stock" only serves to reinforce the two-level test.

Subsequent to the *Forman* decision, the Fourth Circuit decided *Coffin* v. *Polishing Machines, Inc.*, 596 F.2d 1202 (4th Cir. 1979). This case involved the purchase by the Plaintiff of one-half of the outstanding shares of the defendant corporation. As a shareholder and officer of the corporation, the plaintiff was to devote his sole efforts towards the business of the defendant corporation. Upon subsequent investigation, the plaintiff learned he had been defrauded and sued under the applicable federal securities acts. The Fourth Circuit, in reversing a dismissal of the plaintiff's complaint for failure to state a claim, stated with respect to the *Forman* case:

> "We do not believe that *Forman* denies a purchaser of ordinary corporate stock the protection of the federal securities laws simply because he intends to participate in the management of the corporation in which he invests. Both the Securities Act of 1933, 15 U.S.C. 77(b)(1) and the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10), include 'stock' within their definitions of a 'security'. Thus, when a transaction involves stock, there is a strong presumption that the statutes apply. *Occidental Life Insurance Co.* v. *Pat Ryan and Associates, Inc.*, 496 F.2d 1255, 1261 (4th Cir. 1974). *Forman* requires us to analyze the substance of a transaction only when the stocks involved do not have the 'significant characteristics typically associated with the named instrument.' *See Forman*, 421 U.S. 837, 850-51, 95 S.Ct. 2051, 2060, 44 L.Ed. 2d, 621.
>
> Absent some showing that ordinary corporate stocks are other than what they appear to be, we need not consider whether an investor will derive this profit partly from his own efforts. That test, drawn from *SEC* v. *Howey Co.*, 328 U.S. 293, 298, 66 S.Ct. 1100, 90 L. Ed. 1244 (1946), applies to interests not easily recognized as securities in the capital market. It does not apply to stock that comes within the clear lan-

> guage of the securities acts. The court in *Forman*, for example, applied the Howey test only after deciding that the shares under consideration were not like ordinary capital stock."

596 F.2d at 1024.

The two level test Petitioners discussed previously was thus specifically adopted by the Fourth Circuit in *Coffin*. It is obvious that without a trial and the production of evidence, the presumption that "ordinary corporate stock" is other than what it appears to be, cannot be tested.

In the case of *Mifflin Energy Sources, Inc.* v. *Brooks*, [1980] Fed. Sec. L. Rep. Transfer Binder (CCH) ¶97,734 (D. Ct. Pa. 1980), the Pennsylvania District Court faced a situation analagous to the instant case. In *Mifflin*, the Plaintiff purchased 100% of the stock of a business and later filed suit alleging fraud under the federal securities laws. The defendant filed a motion to dismiss the complaint alleging a lack of subject matter jurisdiction on the same basis as the Respondent Poloway claimed in the instant case.

The *Mifflin* court, in analyzing the transaction at issue, stated:

> "In the instant case, however, we are not dealing with a peculiar transaction which may or may not qualify as a securities transaction. The transaction in question here is the sale of 100% of the shares of stock in a coal mining business. The term 'stock' has a common and well accepted meaning in securities law.
>
> > 'Since stock has a traditional and accepted meaning and is indeed one of the most common forms of securities, it is not necessary for the purchase agreement in this case to meet the test generally used to identify an investment contract. What we have here is statutory as well as common law stock. See generally, *Bronstein* v. *Bronstein*, 407 F. Supp. 925 (E. D. Pa. 1976).

Titsch Printing, Inc. v. *Hastings*, 456 F. Supp. 445, 449 (D. Colo. 1978).'

The fact that the subject of the purchase and sale is specifically designated as 'stock' by the parties themselves gives rise to a presumption that we are dealing with 'stock' as it is commonly defined."

The *Mifflin* Court then held that the *Forman* test was not applicable to the facts before it, stating:

"Application of the economic reality test of *Forman* is not necessary here. The present contract is a stock purchase agreement and is so titled. The stock in the corporation has all the traditional attributes of stock, including the right to receive dividends, negotiability, voting rights, and the potential of appreciation in value. There is no evidence to show that what we are dealing with in this transaction is anything other than stock within the definition of the securities laws. Furthermore, *Forman* has been construed to hold:

> . . . [T]hat if the application of the Acts depended in all cases solely upon the economic realities of the transaction, an investor might be unjustly misled by the use of a particular label and form to believe his purchase protected by the securities laws. Consequently the Court stated that when the existence of a covered security is in issue, the name given to an instrument cannot be disregarded, and may, in fact, be highly relevant, especially if the instrument possesses some of the intrinsic features customarily associated with it.

Bronstein v. *Bronstein, supra* at 928."

This approach is also consistent with what the Petitioners allege to be the appropriate application of the federal securities laws.

The Seventh Circuit in its opinion in this case sought to distinguish *Coffin* from the facts at bar by stating:

> "Here, in contrast to the situation in *Coffin*, the transaction did not involve a sale of corporate stock to raise capital for profit-making purposes. The plaintiffs sought to acquire NSM's business in its entirety. The 'stock' sale was a method used to vest ECC with ownership of that business. There was no offer of investment 'securities'."

637 F.2d at 1151.

In dicta, the Seventh Circuit indicated that "the *Coffin* Court's statement of the method of analysis required by *Forman* may be overly broad". *Id.* Clearly there is a conflict among the Circuit Courts of Appeals and also within the United States District Courts.

The Tenth Circuit case of *Chandler* v. *Kew, Inc.* (1979) Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 96,966 (10th Cir. 1977) involved the sale of a business coupled with a transfer of stock. In that case the Tenth Circuit held that the transfer of stock was "incidental" as an indicia of ownership. The defendant seller had no participation in the business after the transfer unlike the Respondent in the case at bar. The holding of the Tenth Circuit appears to be consistent with the Seventh Circuit's holding in the instant case, but contrary to the Fourth Circuit's holding in *Coffin, supra.*

The Tenth Circuit opinion also appears to be in conflict with the holding in *Mifflin Energy Sources, Inc.* v. *Brooks, supra.* The *Mifflin* court distinguished the *Chandler* case as well as others which involved similar facts by stating that:

> "All of these cases, however, involved a contract for the sale of a business pursuant to which the purchasers were to receive 100% of the stock. The stock

in those was a mere 'indicia of ownership', and not the substance of the sale itself.

In this case, the substance of the sale is 100% of stock in a business. This is clearly evidenced by the terms of the stock purchase agreement. Ownership of the business is a by-product of this transaction, but is not sufficient to remove what is clearly expressed in the terms of the purchase and sale of stock from the purview of the federal securities laws."

The distinction raised by the *Mifflin* court does not appear to be a strong one, in that the same result is accomplished whenever 100% of the stock of a company changes hands. Ownership of 100% of stock is in effect ownership of 100% of a business.

In attempting to distinguish the *Chandler* case and others, the *Mifflin* court attempts to avoid a conflict among the federal courts. The weakness of the distinction however does not weaken the holding of the case; to wit, because corporate stock was sold, the federal securities laws are presumptively applicable to the transaction.

The *Mifflin* court makes another important point by stating that:

"someone who purchases shares of stock whether it be 1 percent of 100 percent also has the reasonable expectation that he is a beneficiary of protection afforded by the federal securities laws. The policy behind the securities laws supports the expectation. *Titsch Printing Co.*, supra at 449."

B. CONGRESSIONAL POLICY IN ENACTING THE SECURITIES LAWS HAS BEEN TO PROSCRIBE FRAUD IN A BROAD DEFINITIONAL AREA WITH RESPECT TO A "SECURITY"

Also important in determining the issue at bar is a further examination of the policy considerations involved herein. In the very recent Third Circuit case of *Weaver*

v. *Marine Bank,* [1980] Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 97,727 (3rd Cir. December 15, 1980) which involved the issue as to whether a certain type of certificate of deposit was a "security" within the federal securities laws, in reversing the district court's summary determination that a security was not involved, the majority opinion succinctly stated the policy consideration, in part, as follows:

> "The 1934 Act defines securities so broadly as to include virtually every transaction in which an investor might expect to receive a return on his money. It proscribes misconduct not in terms merely of common law fraud subject to all the vagaries of state law, but in the all-inclusive terms 'manipulative acts and practices in connection with a purchase or sale' of a security. Most significantly, it provides in section 27 of the Act, 15 U.S.C. §78aa, one of those comparatively rare instances in which federal jurisdiction is made exclusive. The message is clear that the federal courts have been given a very special responsibility for overseeing the level of permissible conduct in securities transactions. The reason for the congressional decision is equally clear considering the doleful pre 1934 history of securities transactions during which Congress, dependent upon state common law remedies for regulation of the level of conduct in securities transactions, watched standards of fiduciary duty and of representations in the market place descend to the level tolerated in the most tolerant jurisdiction. Given the special responsibility entrusted to them, the federal courts ought to interpret the 1934 Act with presumption of coverage of any transaction which Congress did not expressly exclude. This is especially so when it is remembered that the state courts cannot enforce section 10(b), and thus that the Supreme Court will lack appellate jurisdiction to consider, when a trial is finally concluded in a state court, whether the underlying transaction offended national policy. 28 U.S.C. §1257."

To limit the coverage of the federal securities laws where corporate stock is involved without a trial on the merits would seem to undermine the Congressional policy in enacting these laws in the 1930's.

With respect to the facts in the case at bar, the *Coffin* case involves a very analogous situation. Since "ordinary corporate stock" (as that term is used in *Coffin*) of NSM was purchased, the transaction falls within the literal definition of "security" and a presumption in favor of Petitioners arises.

From the facts in the record before the lower courts, there was no basis to believe that the stock of NSM was other than ordinary corporate stock. Clearly absent from the record was any fact that would show that the NSM stock did not possess any of the traditional attributes of corporate stock, such as, the right to receive dividends, negotiability or voting rights.

For the purposes of a motion to dismiss, as was the situation at bar, the allegations in the complaint must be taken as true with any reasonable inferences drawn in favor of the Petitioner. *Conley* v. *Gibson,* 355 U.S. 41 (1957). See also *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972) and *Scheuer* v. *Rhodes,* 416 U.S. 232, 236 (1974). A court should not dismiss a plaintiff's complaint for failure to state a claim unless it is clear that the plaintiff cannot prove any sets of facts in support of his claim which would entitle him to relief. *Burns* v. *Paddock,* 503 F.2d 18 (7th Cir. 1974).

Since the transaction at bar falls squarely within the literal definition of a "security", combined with the presumptions that arise when a motion to dismiss is raised by a defendant, it appears that the lower courts erred in granting Respondent's motion to dismiss. The presump-

tion that a "security" is involved is a rebuttable one which, during a trial on the merits would allow Respondent the opportunity to rebut, through evidence, the presumption that the stock of NSM is other than "ordinary corporate" stock.

C. UNDER AN "INVESTMENT CONTRACT" APPROACH, THE TRANSACTION AT BAR IS A "SECURITY" UNDER THE FEDERAL SECURITIES LAWS.

Even by utilizing the "investment contract" approach requiring an "economic reality" examination as suggested by this Court in *Forman,* the transaction at bar involved the sale of a "security". When looking to the instant facts, it is clear that the economic reality of the situation involved Petitioners' complete reliance upon the long years of expertise of the Respondent in the business activities relating to NSM. It is equally clear that Petitioners had no experience in the business of selling and servicing boats, and that, but for the continued reliance upon Respondent's expertise and continued managerial efforts toward the business, as evidenced by the employment agreement, the Petitioners would not have entered into this transaction. The Seventh Circuit, in its opinion in this case disputed whether the instant facts here met two of the elements of the *Forman* investment contract test. The first element was that of investment in a common venture. After noting that Petitioners argued that Respondent was entitled to 20% of the gross profits of NSM and that Respondent was still a shareholder of NSM, though his shares were held in a voting trust, the Seventh Circuit stated that Petitioners' argument with respect to the 20% profits (which the Court mislabeled "commission") was hollow since, calling this percentage a com-

mission, there was no pooling of funds as required by *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 101 (7th Cir. 1977). This ignores the language of the agreement itself which used the words "gross profits", not commissions. Further the Court seemed to ignore the fact that Respondent was still a shareholder of NSM, and the Court made no statement on this point. Clearly, if Respondent was a shareholder of NSM, this is a sufficient pooling of funds.

As to the other element, profits to be derived from the efforts of others, the Seventh Circuit stated that because Respondent was merely an employee of Petitioner ECC, this was insufficient to satisfy this element of the investment contract "economic reality" test. The "economic reality" of the situation cannot be determined solely by an analysis of the documents involved in the transaction. Nor does *Forman* require such a superficial analysis. Petitioners have alleged that they relied on Respondent's management of the business to earn a profit for them. In looking to the efforts which were to be the "undeniably significant ones" as required by *S.E.C.* v. *Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9th Cir. 1973), *cert. denied*, 414 U.S. 821 (1973), a court is required to look beyond the mere written documents to the reality of the transaction. In this case, Petitioners have argued that although they were involved in the management decisions, it was Respondent's efforts which were to be the "significant ones". This cannot be ascertained when merely looking to the documents in the transaction, but requires further evidence to be submitted. Clearly, this is required by the cases herein cited. Petitioners argue that there is, in reality, a set of facts upon which Petitioners can prove that they are entitled to relief and therefore granting Respondent's motion to dismiss was improper.

In summary, the federal courts are in dispute on the issue presented herein, and the position set forth by the Fourth Circuit in *Coffin* v. *Polishing Machines, Inc., supra* and other federal courts, is the appropriate position based upon the decisions of this Court and the policies behind the federal securities laws. Further, the Petitioners assert that the facts herein are sufficient to pass the investment contract "economic reality" test as enunciated by this Court in *United Housing Foundation, Inc.* v. *Forman, supra* and its predecessors, and for that reason, the granting of Respondent's motion to dismiss Petitioners' complaint was improper.

CONCLUSION

For the above and foregoing reasons, the Petitioners pray that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MARK H. SCHIFF
Chicago, Illinois

Attorney for Petitioners

Of Counsel:
PAUL BERNSTEIN
Chicago, Illinois

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 79 C 3817

Honorable JOSEPH SAM PERRY, Presiding Judge.

FREDERICKSEN, et al. vs. POLOWAY

ORDER

This cause comes on upon defendant's motion to dismiss this action. The court has read and considered said motion and the memoranda of the respective parties and finds said motion to be meritorious. Accordingly, it is ORDERED that said motion be and it hereby is granted, and that this action be and it hereby is DISMISSED.

/s/ J. S. Perry

Dated: February 6, 1980

Opinion of Judge Sprecher

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 9, 1981

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 80-1292

JEFFREY E. FREDERIKSEN AND EMERALD CITY CORPORATION, an Illinois corporation,

Plaintiffs-Appellants,

vs.

EDWARD T. POLOWAY, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 79-C-3817

J. SAM PERRY, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the United States Court of Appeals For the Seventh Circuit

No. 80-1292

JEFFREY E. FREDERIKSEN and EMERALD CITY CORPORATION, an Illinois corporation,

Plaintiffs-Appellants,

v.

EDWARD T. POLOWAY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-3817 — J. SAM PERRY, *Judge.*

ARGUED OCTOBER 31, 1980 — DECIDED JANUARY 9, 1981.

Before FAIRCHILD, *Chief Judge,* SPRECHER, and CUDAHY, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This case involves the scope of the federal securities laws. The question we confront is whether alleged fraud regarding the sale of assets and stock in a corporation falls within the scope of those laws. Not all sales transactions which involve "stock" are necessarily covered by the securities laws. Rather, the test for coverage, in general, is whether the purchaser is placing money in the hands of another who will control the funds

and the business decisions. If, however, the purchaser is assuming control of the critical decisions of the corporation, then the transaction is not considered to involve "securities". Here, we find that the purchaser took control of the corporation. Therefore, this situation does not involve a "security" within the meaning of the federal securities laws.

I

During the months of August through October, 1978, Jeffrey E. Frederiksen and Emerald City Corporation ("ECC") negotiated for, and then purchased, the assets and stock of North Shore Marina, Inc. ("NSM"). NSM was in the business of selling, servicing and providing storage facilities for boats at its location in Waukegan, Illinois. The negotiations culminated on October 14, 1978, with the signing of four agreements. The agreements, signed by Mr. Frederiksen, in his capacity as president of ECC, and by Edward Poloway, in his capacity as president and sole shareholder of NSM and in his individual capacity, were as follows: (1) agreement by ECC to purchase assets of NSM; (2) stock purchase and voting trust agreement; (3) employment agreement between ECC and Mr. Poloway; and (4) management agreement between ECC and NSM.

The purchase agreement provided that NSM would sell its assets to ECC for $191,800. The purchase price was to be paid as follows: $160,000 was to be paid into an escrow account to be used to pay all existing debts of NSM and any unknown liabilities; the balance, $31,800, was to be paid in equal monthly installments over a three year period beginning October 14, 1979.

The stock purchase and voting trust agreement provided that in exchange for $10, Mr. Poloway would sell 10% of the issued and outstanding stock of NSM to ECC,

and, for an additional $10 consideration, would transfer his remaining 90% of the issued and outstanding shares of NSM into a voting trust controlled by Mr. Frederiksen. The agreement also provided that after all debts of NSM were paid out of the escrow account, or earlier at the option of ECC, NSM would pay the balance of the funds to Mr. Poloway as the full price for redemption of his shares held in the voting trust.

The employment agreement provided that for a period of five years, ECC would employ Mr. Poloway to "assist, guide and give his expertise" in all areas of ECC's business. Mr. Poloway was to perform within the "goals, guidelines, directives, policies and procedures" set forth by ECC in return for an annual salary of $32,000. As additional compensation, Mr. Poloway was to receive a consulting fee and a 20% commission on the sale of new boats, accessories, and brokerage sales.

The management agreement granted ECC authority to operate and manage the marina facilities. ECC was to receive as compensation 50% of the gross income derived from the operation of the pavilion at the Waukegan marina. All expenses ECC incurred in operating the pavilion were to be deducted from the remaining 50% of gross income, and the remaining balance was to be paid to NSM. It was the understanding of the parties, however, that the operational expenses, together with the management fees to be paid to ECC under the agreement, would, in all probability, eliminate any income to NSM.

On or about May 11, 1979, ECC terminated its employment agreement with Mr. Poloway. On June 14, 1979, Mr. Poloway filed suit against ECC and Mr. Frederiksen in the Circuit Court of Lake County, Illinois for breach of contract and fraud.

On September 14, 1979, ECC and Mr. Frederiksen filed this suit in the United States District Court for the Northern District of Illinois. Plaintiffs allege that the interests they acquired in NSM are "securities" within the meaning of the federal securities acts and that, in connection with the sale of those interests, Mr. Poloway failed to disclose or misrepresented certain material facts. Plaintiffs claim that Mr. Poloway's conduct violates the 1933 and 1934 securities acts, and they seek to recover $1,250,000 in actual damages and lost profits. Plaintiffs also have asserted pendent claims for breach of the Illinois securities laws, common-law fraud, and breach of contract.

Mr. Poloway moved to dismiss the complaint, arguing that the acquisition of NSM did not involve a "security" within the purview of the federal securities laws. He argued that since there was no diversity of citizenship, there was, thus, no basis for subject-matter jurisdiction. Alternatively, Mr. Poloway argued that the complaint failed to allege fraud with particularity, and that Mr. Frederiksen was not a proper party to the action. The district court granted Mr. Poloway's motion and dismissed the suit. The plaintiffs now appeal that dismissal. We affirm the district court's dismissal on the ground that this transaction does not involve a "security" within the meaning of the federal securities laws.

II

The critical legal issue in this case is whether the plaintiffs' acquisition of North Shore Marina involves a "security" within the meaning of the 1933 and 1934 securities acts. We begin the analysis of this issue with a review of the purpose of the securities laws.

The purposes of and policies behind the securities laws were examined by the Supreme Court in the leading case

of *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837 (1975). In *Forman,* residents of a cooperative housing project, who had been required to purchase "stock" in the housing corporation in order to acquire co-op units, filed an action for fraud under the federal securities laws. The Supreme Court held that the shares of stock involved did not constitute "securities" within the meaning of those laws. The Court recognized that:

> The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors.

Id. at 849. The Court emphasized that the securities laws do not apply when the goal of a purchaser is not investment but is a desire to "use or consume the item purchased." *Id.* at 852-53.

Recent decisions of this court recognize that the key to defining the scope of the securities laws is whether the transaction is primarily for commercial (i.e., motivated by a desire to use, consume, occupy or develop), or for investment purposes. *See Canadian Imperial Bank of Commerce Trust Co.* v. *Fingland,* 615 F.2d 465, 470 (7th Cir. 1980) (complaint regarding bank certificates of deposit did not plead securities fraud where it "simply describes a victim whose currency was being held in a commercial transaction and not a victim-investor aspiring for profits"); *Emisco Industries, Inc.* v. *Pro's, Inc.,* 543 F.2d 38 (7th Cir. 1976) (note given as part of sale of all assets of a corporation not an investment where there was no reliance on efforts of others to produce profit).

III

We now turn to plaintiffs' claim that the interests they acquired in NSM constitute "securities" within the meaning of the federal securities laws.[1] First, plaintiffs argue that ECC's purchase of NSM stock falls under the literal wording of the federal securities laws and, for that reason, a legal presumption exists that a security was sold. There are several problems with this "literal application" theory.

The first problem is that the language in the securities acts is not as broad as the plaintiffs contend. Although 15 U.S.C. § 78c(a)(10) ("1934 Act") provides that "[t]he term security means any . . . stock," that definition, as are all the definitions in § 78c(a), is preceded by the phrase "unless the context otherwise requires." 15 U.S.C. § 78c (a). The definition of "security" in the Securities Act of 1933 is prefaced by the same phrase. 15 U.S.C. § 77b(1).

The second problem is that it is not the case that any conduct within the theoretical reach of a statute is necessarily governed by that statute. In *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892), the Supreme Court stated:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.

---

[1] Plaintiffs argue in their brief that the securities laws should be presumed to apply because the allegations in their complaint should be taken as true, for purposes of a motion to dismiss. But this argument begs the question. While well-pleaded allegations of the complaint are taken as true for purposes of deciding a motion to dismiss, sweeping conclusions of law and unwarranted deductions of fact are not to be taken as true. *Mitchell* v. *Archibald & Kendall, Inc.,* 573 F.2d 429, 432 (7th Cir. 1978).

The third problem with the plaintiffs' "literal application" argument is that the *Forman* decision and its progeny have specifically rejected that argument. The *Forman* Court stated:

> We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." Rather we adhere to the basic principle that has guided all of the Court's decision in this area:
>
> > "[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967).

421 U.S. at 848 (footnote omitted). The *Forman* Court applied an "economic reality" anlaysis, *id.* at 849, in concluding that the purchase of stock to acquire an apartment in a housing cooperative was not an investment and therefore was not within the scope of the federal securities laws. Similarly, the "literal application" theory has been rejected in post-*Forman* cases. *See, e.g., Chandler* v. *Kew, Inc.*, [1979] Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 96, 966 (10th Cir. 1977) (sale of liquor store where buyer received 100% of stock as indicia of ownership not within federal securities laws); *Bula* v. *Mansfield*, 1979 Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 96,964 (D. Colo. 1977) (sale of option to buy 100% of stock from sole owner of corporation whose business was ownership and operation of a restaurant was, in economic reality, sale of option to buy restaurant and, therefore, not within federal securities laws).

Finally, the cases cited by plaintiffs in support of their "literal application" argument are inapposite. Two of

the three cases cited, *Alberto-Culver Co.* v. *Scherk,* 484 F.2d 611 (7th Cir. 1973), *rev'd on other grounds,* 417 U.S. 506 (1974), and *Occidental Life Insurance Co. of North Carolina* v. *Pat Ryan & Assoc., Inc.,* 496 F.2d 1255 (4th Cir. 1974), *cert. denied,* 419 U.S. 1023 (1974), were decided before *Forman,* and are, therefore, of little precedential value. The third case, *Coffin* v. *Polishing Machines, Inc.,* 596 F.2d 1202 (4th Cir. 1979), *cert. denied,* 444 U.S. 868 (1979), although decided after Forman, is distinguishable from *Forman.*

In *Coffin,* the president of Polishing Machines, Inc. contacted the plaintiff and encouraged him to purchase stock in the corporation. The president stated that Polishing Machines was offering its stock in order to finance expansion. The parties reached an agreement in which the plaintiff acquired 50% of the outstanding stock of the Polishing Machines and became its executive vice-president. The plaintiff thereafter discovered he had been defrauded in the transaction and sought recovery under the federal securities laws.

The Fourth Circuit reversed the district court's dismissal of the complaint for lack of subject-matter jurisdiction, holding that when "ordinary capital stock" is involved in a transaction, it is covered by the securities laws. 596 F.2d at 1204. In analyzing the transaction, the court stated:

> [T]he descriptive report supplied to Coffin during the negotiations indicates that Polishing Machines wanted to sell stock in order to finance corporate expansion. Thus, the transaction appears to be the very sort of transfer with which the federal securities laws are most concerned, "the sale of securities to raise capital for profit-making purposes." *Forman,* 421 U.S. 837, 349.

596 F.2d at 1204.

Here, in contrast to the situation in *Coffin*, the transaction did not involve a sale of corporate stock to raise capital for profit-making purposes. The plaintiffs sought to acquire NSM's business in its entirety. The "stock" sale was a method used to vest ECC with ownership of that business. There was no offer of investment "securities". The stock of NSM merely was passed incidentally as an indicia of ownership of the business assets sold to ECC.[2] *See* Chandler,[1979] Fed. Sec. L. Rep. Transfer Binder ¶ 96,966, and *Bula*, [1979] Fed. Sec. L. Rep. Transfer Binder ¶ 96,964. For the above reasons, we reject the plaintiffs' "literal application" theory.

IV

Plaintiffs' second argument is that the transaction here meets the requirements of a securities investment under the "economic reality" test announced in *Forman*. The "economic reality" test for determining the existence of a

---

[2] Moreover, we note, without deciding, that the *Coffin* court's statement of the method of analysis required by *Forman* may be overly broad. The *Coffin* court stated:

> Forman requires us to analyze the substance of a transaction *only* when the stocks involved do not have the "significant characteristics typically associated with the named instrument."

596 F.2d at 1204, *quoting Forman*, 421 U.S. at 851 (emphasis added).

We are not persuaded that the cited passage supports the *Coffin* court's conclusion. Our reading of *Forman* is that an "economic reality" assessment might be required by *Forman* even if the stocks involved do have some characteristics typically associated with investment securities. As the *Forman* Court stated:

> Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto.

421 U.S. at 849. This language implies that the "economic reality" of a transaction is always a key issue.

security involves three elements: (1) an investment in a common venture; (2) premised on a reasonable expectation of profits; (3) to be derived from the entrepreneurial or managerial efforts of others. *Forman*, 421 U.S. at 852. The first and third elements of this analysis are in issue here.

The first element of the "economic reality" test is whether there is an investment in a common venture. Plaintiffs argue that there was an investment in a common venture here because the employment agreement with Mr. Poloway stated that he was entitled to 20% of the gross profits of NSM, and because Mr. Poloway continued to be a shareholder in NSM, although his stock was placed in a voting trust.

In *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 101 (7th Cir. 1977), this court stated that a "sharing or pooling of funds" is required to satisfy the test for a common enterprise. Plaintiffs suggest that because Mr. Poloway received a 20% commission on NSM sales, they and Mr. Poloway "shared" their profits, and thus, there was an investment in a common enterprise. But merely stating the plaintiffs' argument reveals its hollowness. After the sale, Mr. Poloway was an employee of ECC, not a participant in an enterprise whose profits were shared.[3] The fact that an employee receives partial compensation

---

[3] The employment agreement between ECC and Mr. Poloway states, in relevant part:

> It shall be the duty of the Employee during the period of this agreement to devote his full time and best efforts to assist, guide and give his expertise in all areas of business in which the Company will be engaged and to operate within the goals, guidelines, directives, policies and procedures as communicated to Employee by Company and to do such other things as may be reasonably required by Company.

in commissions on sales does not transform an employment contract into a securities investment.

The third element of the "economic reality" test,—that profits be derived from efforts of others—presents an even more difficult hurdle for the plaintiffs. Plaintiffs argue that they had no experience in the business of selling and servicing boats and that they relied completely on the managerial efforts and expertise of Mr. Poloway. The first problem with this argument is that it is contradicted by materials in the record on appeal.

Contrary to plaintiffs' argument, the record discloses that the plaintiffs, not Mr. Poloway, were responsible for the continued management of NSM. First, the employment agreement between ECC and Mr. Poloway stated that Mr. Poloway will:

> operate within the goals, guidelines, directives, policies and procedures as communicated to Employee by Company and to do such other things as may be reasonably required by Company.

Second, in plaintiffs' motion to disqualify defendant's counsel, plaintiffs stated:

> In October of 1978 the assets of NORTH SHORE MARINE were sold to the Plaintiff corporation, EMERALD CITY. Further, NORTH SHORE MARINE entered into a management contract with EMERALD CITY CORPORATION which effectively delegated the total management and operation of the business to EMERALD CITY.

Third, in an affidavit attached to the plaintiffs' motion to disqualify defendant's counsel, Mr. Frederiksen stated:

> Affiant, as shareholder and officer of EMERALD CITY CORPORATION, has, since October of 1978, been involved in the operations of NORTH SHORE MARINE, INC.

> Affiant, as President of NORTH SHORE MARINE, INC., has been involved with all management decisions of NORTH SHORE MARINE since the purchase of all of the assets of said corporation of October 14, 1978.

Finally, the stock purchase and voting trust agreement provided:

> Effective upon the date hereof, Edward T. Poloway will tender his resignations as an officer and director of North Shore Marine, Inc., and will cause any and all remaining directors and/or officers to tender their resignations at the same time.

These materials in the record indicate that ECC was assuming management of NSM, not that it was relying completely on the management of Mr. Poloway.

The second problem with the plaintiffs' attempt to meet the source-of-profit requirement of the "economic reality" anaylsis is that the employment relationship they created with Mr. Poloway is not legally sufficient to meet that requirement. As we stated in *Emisco Industries, Inc.* v. *Pro's, Inc.*, 543 F.2d 38, 41 (7th Cir. 1976), "[t]he important element for the transaction to constitute an investment is that [the investor] relied on present and future efforts of another to produce profits." As the Ninth Circuit stated in *S.E.C.* v. *Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9th Cir. 1973), *cert. denied*, 414 U.S. 821 (1973), the test for determining whether the reliance element has been met is "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." Similarly, the Third Circuit has stated:

> [A]n investment contract can exist where the investor is required to perform some duties, *as long as they are nominal or limited* and would have "little direct effect upon receipt by the participant of the benefits promised by the promoters."

Lino v. *City Investment Co.*, 487 F.2d 689, 692 (3d Cir. 1973), *quoting* Sec. Act Release No. 5211 (1971) (emphasis added).

To be sure, ECC expected, and by contract required, Mr. Poloway to give his "best efforts" and "expertise" to NSM and ECC. But Mr. Poloway, as an employee, was not responsible for those "essential managerial decisions," *Turner Enterprises*, 474 F.2d at 482, affecting the conduct of the business. Indeed, Mr. Poloway's "best efforts" were specified by the employment agreement to be "within the goals, guidelines, directives, policies and procedures" of ECC.

Because ECC so strongly assumed management control when it purchased NSM, the ECC efforts were clearly not "nominal or limited," *Lino*, 487 F.2d at 692. Although ECC certainly depended on Mr. Poloway to be a good employee, the fact that plaintiffs took over and operated the business clearly demonstrates that they were not "relying" on Mr. Poloway within the concept of a securities investment.[4]

---

[4] *See Emisco Industries*, 543 F.2d at 41 ("As[the buyer] planned to take over and operate the business of [the seller], it is nonsensical to say that it is depending upon [the seller's] current or future efforts to produce a profit"). *See also Shultz* v. *Dain Corp.*, 568 F.2d 612, 615 (8th Cir. 1978) and *Fargo Partners* v. *Dain Corp.*, 540 F.2d 912, 914-15 (8th Cir. 1976) (where buyer of apartment complex agrees that seller will manage the complex, buyer retains control and thus does not "rely" on seller within the meaning of a securities investment); and *Commander's Palace Park Assoc.* v. *Girard & Pastel Corp.*, 572 F.2d 1084, 1086 (5th Cir. 1978) (where purchaser bought and leased back mobile home park, and seller undertook substantial responsibilities, because seller's efforts alone were not the "crucial" efforts, the buyer did not "rely" within the meaning of a securities investment).

For the above reasons, we find that this matter does not properly come within the scope of the federal securities laws, under either the "literal application" or the "economic reality" theory. Thus, the district court did not have subject-matter jurisdiction and properly dismissed the two federal securities claims.[5]

V

Plaintiffs' final argument is that the trial court erred in dismissing their pendent state and common law claims. But the plaintiffs' argument is based on their conclusion that the district court had subject-matter jurisdiction of their federal securities claims. Since we find that the district court did not have subject-matter jurisdiction, it follows that the pendent claims must also be dismissed. *See Forman,* 421 U.S. at 860 n.27 and *Chandler,* [1979] Fed. Sec. L. Rep. Transfer Binder (CCH) ¶ 96,966 at 96,054.

For the above reasons, the district court's dismissal of this case is

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[5] Because we find that this matter does not come within the scope of the federal securities laws, we do not reach the defendant's alternate theories that plaintiffs failed to plead fraud with the requisite specificity and that Mr. Frederiksen is not a proper party to this action.

80-1673

No. 80-1292

Office-Supreme Court, U.S.
FILED
MAY 6 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFREY E. FREDERICKSEN and
EMERALD CITY CORPORATION, an Illinois corporation,

Petitioners,

vs.

EDWARD T. POLOWAY,

Respondent.

BRIEF AND APPENDIX FOR RESPONDENT, EDWARD T. POLOWAY, IN OPPOSITION TO PETITION FOR CERTIORARI.

JOHN W. HOUGH
DONALD C. SHINE
MICHAEL H. MOIRANO
Attorneys for Respondent

HOWINGTON, ELWORTH, OSSWALD & HOUGH
135 South LaSalle St., Suite 3910
Chicago, Illinois 60603
312/346-7900
Of Counsel.

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED

This case does not present any question worthy of review by this Court.

The only issues presented by this case are:

1. Whether the petition should be denied since the decision of the Court of Appeals is correct and in conformity with the decisions of this Court and other courts.

2. Whether the petition should be denied because the decision below affects only the private parties to this litigation, and does not involve any important principle of law or matter of public policy.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
I. Additional Statement of the Case	1
A. Introduction	1
B. The Transaction	2
C. The Litigation	3
II. Argument	4
A. The Presence of Stock in a Transaction Does Not Create a Presumption That the Transaction Is Cognizable Under the Federal Securities Laws	4
B. Congressional Policy Is Not Thwarted by the Decision of the Seventh Circuit	9
C. An "Economic Reality" Examination Reveals That the Transaction in This Case Did Not Involve a Security	11
Conclusion	13
Appendix	1a
Complaint in the District Court for the N. D. of Illinois, in the matter of Jeffrey E. Frederiksen and Emerald City Corp. v. Edward T. Poloway, 79 C 3317, filed September 4, 1979	1a
Asset Purchase Agreement between North Shore Marine, Inc. and Emerald City Corporation, October 14, 1978	12a
Stock Purchase and Voting Trust Agreement between Emerald City Corporation and Edward T. Poloway, October 14, 1978	31a
Employment Agreement between Emerald City Corporation and Edward T. Poloway, October 14, 1978	42a
Management Agreement between North Shore Marine and Emerald City Corporation, October 14, 1978	52a

TABLE OF AUTHORITIES CITED

Cases

PAGE

Alberto-Culver Co. v. *Scherk,* 484 F. 2d 611 (7th Cir. 1973), rev'd., 417 U. S. 506 (1974) 7

Anchor-Darling Industries, Inc. v. *Suozzo,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,933 (E. D. Pa. March 16, 1981) 9

Bronstein v. *Bronstein,* 407 F. Supp. 925 (E. D. Pa. 1976) 9

Bula v. *Mansfield,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,964 (D. Colo. 1977) ... 9

Canadian Imperial Bank of Commerce Trust Co. v. *Fingland,* 615 F. 2d 465 (7th Cir. 1980) 11

Chandler v. *Kew, Inc.,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,966 (10th Cir. 1977) 9

Choudhry v. *Jenkins,* 559 F. 2d 1085 (7th Cir. 1977) 11

Coffin v. *Polishing Machines, Inc.,* 596 F. 2d 1202 (4th Cir. 1979) 7

Dueker v. *Turner* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,386 (N. D. Ga. 1979). 9

Mifflin Energy Sources, Inc. v. *Brooks,* 501 F. Supp. 334 (W. D. Pa. 1980) 9

Mitchell v. *Archibald & Kendall, Inc.,* 573 F. 2d 429 (7th Cir. 1978) 11

Occidental Life Insurance Co. of North Carolina v. *Pat Ryan & Assoc., Inc.,* 496 F. 2d 1255 (4th Cir. 1974) 7

S. E. C. v. *Joiner,* 320 U. S. 344 (1943) 5

Tcherepnin v. *Knight,* 389 U. S. 332 (1967) 5

PAGE

Titsch Printing, Inc. v. *Hastings,* 456 F. Supp. 925 (E. D. Pa. 1976) 9
United Housing Foundation, Inc. v. *Forman,* 421 U. S. 837 (1975) 4
In re Woodmar Realty Co., 294 F. 2d 785 (7th Cir. 1961) 11

Statutory Provisions

Securities Act of 1933, Section 2(1), 15 U. S. C. § 77(b)(1) 4
Securities Act of 1933, Section 22(a), 15 U. S. C. § 77(v)(a)(1976) 3
Securities Exchange Act of 1934, 3(a)(10), 15 U. S. C. § 78(c)(a)(10) 4
Securities Exchange Act of 1934, Section 27, 15 U. S. C. § 78aa (1976) 3
Federal Rules of Civil Procedure, Rule 12(h)(3) .. 11
Supreme Court Rules 17 and 21 13

Congressional Record

S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933) 10
H. R. Rep. No. 85, 73d Cong., 1st Sess. 3 (1933) ... 10

Articles

I Loss, Securities Regulation, 21 (2d Ed. 1961) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFREY E. FREDERICKSEN and
EMERALD CITY CORPORATION, an Illinois corporation,

Petitioners,

vs.

EDWARD T. POLOWAY,

Respondent.

BRIEF AND APPENDIX FOR RESPONDENT, EDWARD T. POLOWAY, IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondent prays that the petition for writ of certiorari be denied.

I. ADDITIONAL STATEMENT OF THE CASE

A. Introduction.

The statement of the case in the petition does not adequately set forth the facts material to the consideration of the questions presented, and substantially differs from the facts as they appear in the record. To correct these inaccuracies and omissions, the following additional statements of the case is deemed necessary.

B. The Transaction.

From August through October 14, 1978, petitioners, Emerald City Corporation ("ECC") and its sole shareholder, Jeffrey E. Fredericksen, negotiated for all the assets and stock of North Shore Marine, Inc. ("NSM"). (Resp. App. p. 3a). NSM was then solely owned and operated by respondent, Edward T. Poloway, and was in the business of selling, servicing and providing storage facilities for boats at the Waukegan, Illinois harbor. (Resp. App. p. 3a). On October 14, 1978 the negotiations culminated with the signing of four agreements. The agreements were as follows: (1) agreement by ECC to purchase all assets of NSM; (2) stock purchase and voting trust agreement; (3) employment agreement between ECC and Mr. Poloway; and (4) management agreement between ECC and NSM. (Resp. App. pp. 12a-56a).

The asset purchase agreement provided that NSM would sell all of its assets to ECC for $191,800. The purchase price was to be paid as follows: $160,000 was to be paid into an escrow account to pay all existing debts of NSM and any unknown liabilities; the balance, $31,800, was to be paid in equal monthly installments over a three year period beginning one year thereafter, i.e., October 14, 1979. (Resp. App. p. 14a).

The stock purchase and voting trust agreement provided that in exchange for $10, Mr. Poloway, the sole shareholder of NSM, would sell 10% of the issued and outstanding stock of NSM to ECC, and, for an additional $10 consideration, would transfer his remaining 90% of the issued and outstanding shares of NSM into a voting trust controlled by Mr. Frederiksen. The agreement also provided that after all debts of NSM were paid out of the escrow account, or earlier at the option of ECC, the balance of the shares in the voting trust would be redeemed. (Resp. App. pp. 31a-32).

The employment agreement provided that ECC would employ Mr. Poloway and that it was his duty "to donate his full time and best efforts to assist, guide and give his expertise" in

all areas of ECC's business. As "Employee," Mr. Poloway was bound "to operate within the goals, guidelines, directives, policies and procedures as communicated to [him] by [ECC]," (Resp. App. p. 43a).

Under the management agreement NSM engaged ECC as its exclusive agent to manage and operate the marina facilities. As compensation for management services ECC was to receive 50% of the gross income derived from the business. All expenses ECC incurred in operating the business were to be deducted from the remaining 50% of gross income and any remaining income was to be paid to NSM. It was the express understanding of the parties, however, that the operational expenses and the management fees to be paid to ECC would, in all probability, eliminate any income to NSM. (Resp. App. pp. 52a, 55a, ¶¶ 1, 3 and 6).

C. The Litigation.

On or about May 11, 1979, ECC terminated its employment agreement with Mr. Poloway. On June 14, 1979, Mr. Poloway filed suit against ECC and Mr. Frederiksen in the Circuit Court of Lake County, Illinois for breach of contract and fraud. (Pet. App. p. 5). The state court suit remains pending.

On September 17, 1979, ECC and Mr. Frederiksen filed this suit and attached the above described agreements as exhibits thereto. Federal jurisdiction was invoked under the federal securities laws, 15 U. S. C. §§ 78aa (1976) and 77(v)(a) (1976), for counts I and II, respectively, and upon principles of pendent jurisdiction for the balance of the counts—counts III through V. (Resp. App. p. 2a). Diversity jurisdiction was not pled, nor could it have been.

The complaint alleges that the interests plaintiffs acquired in NSM are "securities" within the meaning of the federal securities acts and that, in connection with the sale of these "securities," Mr. Poloway failed to disclose or misrepresented certain material facts. The complaint seeks $1,250,000 in actual damages, $5,000,000 in punitive damages, attorneys fees and costs of suit.

Mr. Poloway moved to dismiss the complaint on the grounds that the complaint failed to state a claim under the federal securities laws, that the court lacked subject matter jurisdiction, that Mr. Frederiksen was not a proper party to the action and that plaintiffs failed to plead fraud with particularity. The parties filed supporting and opposing memoranda in connection with the motion. The district court granted Mr. Poloway's motion and dismissed the suit. (Pet. App. p. 6). At no time did ECC or Mr. Frederiksen attempt to amend the complaint.

On appeal the Seventh Circuit affirmed the district court's dismissal "on the ground that this transaction does not involve a 'security' within the meaning of the federal securities laws." (Pet. App. p. 6).

II. ARGUMENT

A. The Presence Of Stock In A Transaction Does Not Create A Presumption That The Transaction Is Cognizable Under The Federal Securities Laws.

This Court's decision in *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975), refutes petitioners' assertion that, because "stock" is literally defined as a "security,"[1] the mere involvement of stock in a transaction creates a presumption of federal securities law coverage. (Pet. pp. 5-6).

The literal approach which underpins petitioner's thesis was expressly rejected by this Court in *Forman, supra,* at 848:

> We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." Rather we adhere to the basic principle that has guided all of the Court's decisions in this area:

---

[1] Section 2(1) of the Securities Act of 1933, 15 USC § 77b(1), and Section 3(a)(10) of the Securities Exchange Act of 1934, 15 USC § 78c(10), define "security" in pertinent part as follows: "unless the context otherwise requires . . . the term 'security' means any . . . stock. . . ."

> [I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin* v. *Knight,* 389 U. S. 332, 336, 19 L. Ed. 2d 564, 88 S. Ct. 548 (1967). *See also, Howey, supra,* at 298, 90 L. Ed. 1244, 66 S. Ct. 1100, 163 ALR 1043.

(Footnote omitted.)

Moreover, the *Forman* decision simply does not speak in terms of presumption or even suggest the creation of a presumption. Rather, the decision is most explicit in stating that the focus is on the transaction and its attendant economic realities:

> Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. Thus, in construing these Acts against the background of their purpose, we are guided by a traditional canon of statutory construction:
>
> > "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *U.S.,* 143 US 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892).

Forman, supra at 849. (citation omitted). Thus, it is the economic realities of a transaction that are germane to a determination of whether a cognizable "security" is involved and not "the name [of the instrument] appended thereto."

Petitioners rely substantially upon pre-*Forman* decisions of this Court, *viz., S.E.C.* v. *Joiner,* 320 U.S. 344 (1943) and *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967), in support of their so-called "two level" hybrid of the literal approach. (Pet. pp. 5-10). However, petitioners overlooked or ignored the portion of the decision in *Forman, supra,* which qualifies the dicta in those opinions upon which petitioners rely. With respect to *Joiner* this Court observed and ruled as follows:

> Respondents' reliance on *Joiner* as support for a "literal approach" to defining a security is misplaced. The issue in *Joiner* was whether assignments of interests in oil leases, coupled with the promoters' offer to drill an exploratory well, were securities. Looking to economic inducement provided by the proposed exploratory well, the Court concluded that these leases were securities even though "leases" as such were not included in the list of instruments mentioned in the statutory definition. In dictum the Court noted that "[i]nstruments *may* be included within [the definition of a security], as [a] matter of law, if on their face they answer to the name or description." 320 US, at 351, 88 L. Ed. 88, 64 S. Ct. 120 (emphasis supplied). And later, again in dictum, the Court stated that a security "*might*" be shown "by proving the document itself, which on its face would be a note, a bond, or a share of stock." Id., at 355, 88 L. Ed. 88, 64 S. Ct. 120 (emphasis supplied). By using the conditional words "may" and "might" in these dicta the Court made clear that it was not establishing an inflexible rule barring inquiry into the economic realities underlying a transaction.

Forman, 421 U. S. at 849-850. With respect to *Tcherepnin* this Court stated:

> Nor can respondents derive any support for a literal approach from *Tcherepnin* v. *Knight, supra,* which quoted the *Joiner* dictum. Indeed in *Tcherepnin* the Court explicitly stated that "form should be disregarded for substance," 398 U.S., at 336, 19 L. Ed. 2d 564, 88 S. Ct. 548, and only after analyzing the economic realities of the transaction at issue did it conclude that an instrument called a "withdrawable capital share" was, in substance, an "investment contract," a share of "stock" a "certificate of interest or participation in [a] profit sharing agreement," and a "transferrable share."

Id. at 850, n. 15.

In sum, petitioners are proposing a test to determine a cognizable "security" which is composed of a "literal approach" and a concomitant "presumption". The "literal approach" was expressly rejected in *Forman, supra,* and our

research discloses no case where the "presumption" has ever been created or countenanced by this Court.

Petitioners cite three decisions of Courts of Appeals in support of their position and argue that these decisions are in conflict with the decision of the Seventh Circuit in this case. (Pet. pp. 11-15). Two of those cases, *Alberto-Culver Co.* v. *Scherk,* 484 F. 2d 611 (7th Cir. 1973), [2] *rev'd on other grounds,* 417 U. S. 506 (1974), and *Occidental Life Insurance Co. of North Carolina* v. *Pat Ryan & Assoc., Inc.,* 496 F. 2d 1255 (4th Cir. 1974), predate *Forman,* and are of little precedential value. The third case, *Coffin* v. *Polishing Machines, Inc.,* 596 F. 2d 1202 (4th Cir. 1979), postdated *Forman;* however, it is factually distinguishable.

In *Coffin,* the president of Polishing Machines, Inc., contacted Coffin and encouraged him to purchase stock in the corporation. The president explained that Polishing Machines was offering to sell some of its stock in order to finance expansion. An agreement was reached under which Coffin acquired 50% of the outstanding stock of Polishing Machines and became its executive vice-president. Coffin thereafter discovered he had been defrauded in the transaction and sought recovery under the federal securities laws.

The Fourth Circuit reversed the district court's dismissal of the complaint for lack of subject matter jurisdiction, holding that when "ordinary capital stock" is involved in a transaction, the transaction is covered by the securities laws. However, in analyzing the transaction the court noted that:

> The descriptive report supplied to Coffin during the negotiations indicates that Polishing Machines wanted to sell stock in order to finance corporate expansion. Thus, the transaction appears to be the very sort of transfer with

---

[2] *Scherk* was decided by a divided Court of Appeals. Senior District Judge Robert A. Grant of the Northern District of Indiana, sitting by designation, joined with by District Judge Myron L. Gordon, also sitting by designation, wrote the opinion of the court. Circuit Judge Stevens (now Justice Stevens) dissented.

> which the federal securities laws are most concerned, the sale of securities to raise capital for profit-making purposes. *Forman,* 421 U. S. 837, 849.

596 F. 2d at 1024 (citations omitted).

Here, in contrast with *Coffin,* the transaction did not involve a limited sale of corporate stock to raise capital for profit-making purposes. The impetus for the transaction came from the petitioners, who sought to acquire complete control of NSM's business. In their brief to the Seventh Circuit petitioners conceded that it was their intention at the time of the transaction "to rebuild the business."

Furthermore, petitioners attached to their complaint the four agreements which collectively formed the basis of the sale of NSM. (The agreements are reprinted in the appendix hereto.) These agreements show that ECC purchased, for $191,800, *all* of the assets of NSM and, for an additional $20, control of *all* the NSM stock. In addition, under the management agreement ECC was granted complete authority to operate the marina facilities NSM leased from the Waukegan Port District and was to receive all income derived therefrom.

There can be no doubt that ECC, unlike the complainant in *Coffin,* intended to and did take over complete control and operation of the business of NSM. The termination of Mr. Poloway's employment agreement by ECC on May 11, 1979 (Pet. App. 5) conclusively demonstrates control.

When analyzed economically the facts dictate that ECC was not "investing" in NSM in the statutory sense; ECC purchased a business and was motivated solely by commercial considerations, "by a desire to use or consume the item purchased—to occupy the land or to develop it themselves." *Forman, supra* at 852. Because this transaction was of a commercial nature, the district court and Seventh Circuit properly held that the securities laws did not apply. The Seventh Circuit was perfectly correct in holding that the "stock" was merely a device used in a commercial transaction to vest ECC

with ownership of that business. (Pet. App. p. 7). There was no offer of "securities" in the traditional sense—the stock of NSM was merely passed incidentally as an indicia of ownership of the business assets sold to ECC. *Accord, Chandler* v. *Kew, Inc.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,966 (10th Cir. 1977) (not elsewhere reported).[3]

In sum, the decision in this case is not in conflict with *Coffin*, nor with any other decisions of the Courts of Appeals.

B. Congressional Policy Is Not Thwarted By The Decision Of The Seventh Circuit.

Under the banner of "congressional policy," petitioners appear to be suggesting that the intent of Congress in enacting the 1933 and 1934 securities laws is frustrated by the pre-trial dismissal of complaints alleging fraud in connection with the purchase of business via corporate stock.[4] Interwoven with this assertion is a reiteration of the "literal approach." (Pet. p. 17-18). There are several problems with these asserted contentions.

---

[3] The balance of the cases cited by petitioners are district court decisions. *Mifflin Energy Sources, Inc.* v. *Brooks*, 501 F. Supp. 334 (W. D. Pa. 1980); *Titsch Printing, Inc.* v. *Hastings*, 456 F. Supp. 445 (D. Colo. 1978) and *Bronstein* v. *Bronstein*, 407 F. Supp. 925 (E. D. Pa. 1976). The cited cases have been refuted by, *Dueker* v. *Turner*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,386 (N. D. Ga. 1979) and *Anchor-Darling Industries, Inc.* v. *Suozzo*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,933 (E. D. Pa. March 16, 1981). Moreover, all of these cases are factually inapposite since none involved a sale of assets coupled with an incidental stock transaction.

The only courts which have considered the issue raised here, i.e., a transaction involving the sale of a business coupled with an incidental transfer of stock reached the same result as the Seventh Circuit did in this case. *See, Chandler* v. *Kew, Inc., supra* (sale of "described business and personal property"); and, *Bula* v. *Mansfield*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,964 (D. Colo. 1977) (purchase of "The Restaurant" including fixtures).

[4] See, Petition, p. 17 "To limit the coverage of the federal securities laws where corporate stock is involved without a trial on the merits would seem to undermine the congressional policy in enacting these laws in the 1930's."

First, the emphasis of the federal securities law is on capital transactions, not those of a commercial nature. In regulating the sales of "securities" Congress sought to remedy abuses only in the capital market. The securities laws were enacted to correct the "wanton misdirection of the capital resources of the nation," H. R. Rep. No. 85, 73d Cong., 1st Sess. 3 (1933), and "to bring into productive channels of industry and development capital which has grown timid to the point of hoarding." S. Rep. No. 47, 73d Cong. 1st Sess. 1 (1933). *See also* I Loss, *Securities Regulation,* 21 (2d Ed. 1961). The transaction in issue here involved the commercial sale of a business, not an abuse in the capital market.

Second, the language in the securities acts is not as broad as petitioners urge. (Pet. pp. 15-18). As the Seventh Circuit appropriately observed:

> Although 15 U.S.C. § 78c(a) (10) ("1934 Act") provides that "[t]he term security means any ... stock," that definition, as are all the definitions in the § 78c(a), is preceded by the phrase "unless the context otherwise requires." 15 U.S.C. § 78c(a). The definition of "security" in the Securities Act of 1933 is prefaced by the same phrase. 15 U.S.C. § 77b(1).

(Pet. App. p. 8).

Third, the record before the lower courts did, contrary to petitioners' present assertion, (Pet. p. 17) contain a basis for concluding that the stock of NSM was other than ordinary corporate stock. In the management agreement, wherein petitioner ECC assumed the management of NSM, both parties acknowledged that ECC's management fee would in all probability eliminate any income to NSM. (Resp. App. p. 55a, ¶ 6). Absent income NSM could pay no dividends. Thus, one of the attributes of corporate stock, i.e. dividends, was not contemplated by the parties to be part of the bargain. This further removes the notion of investment and further supports the Seventh Circuit's conclusion that this was a commercial

transaction. (Pet. App. 7). *Accord, Canadian Imperial Bank of Commerce Trust Co.* v. *Fingland,* 615 F. 2d 465, 470 (7th Cir. 1980).

Fourth, while respondent concedes that a complainant's allegations and reasonable inferences drawn thereon must be taken as true in this context, sweeping conclusions of law and unwarranted deductions of fact are not to be taken as true. *Mitchell* v. *Archibald & Kendall, Inc.,* 573 F. 2d 429, 432 (7th Cir. 1978). The gravamen of the complaint herein alleges fraud in the form of overstating assets and understating liabilities. (Resp. App. p. 5). Consequently, if there was fraud, the nexus of the fraud was to the sale of assets and not to the incidental transfer of stock. Moreover, even if petitioners sought leave to amend the complaint, which they did not, to the extent that there would be any inconsistency between the complaint and factual matters in the record, the record would control. *In re Woodmar Realty Co.,* 294 F. 2d 785, 788 (7th Cir. 1961). Here, petitioners appended the four agreements in the transaction to the complaint, which agreements contravene petitioners' investment thesis.

Finally, and regretfully, it must be stated that petitioners' bold assertion that "it would seem to undermine congressional policy" for courts to dismiss prior to trial "securities" cases of this sort is absurd. Rule 12, F. R. Civ. P., has no such exception. Indeed, "Rule 12(h) (3) permits a court to dismiss an action *sua sponte* when the court determines it lacks subject matter jurisdiction." *Choudhry* v. *Jenkins,* 559 F. 2d 1085, 1091 (7th Cir. 1977); F. R. Civ. P. 12(h) (3).

C. An "Economic Reality" Examination Reveals That the Transaction in This Case Did Not Involve a Security.

Petitioners' final assertion is that *even* under the three part "economic reality" analysis required by *Forman* the transaction in this case involved the sale of a "security." With two

exceptions respondent shall rely on the Seventh Circuit's review of the record and cogent analysis on this point. (Pet. App. pp. 3-16; particularly pp. 11-15).

Petitioners maintain "[they] have alleged that they relied on respondent's management of the business to earn a profit for them." (Pet. p. 19). The complaint does not so allege. The complaint does not *even* so suggest, nor could it. Any such allegation is controverted by Mr. Poloway's employment agreement with ECC and the several other portions of the record referenced in the Seventh Circuit's opinion. (Pet. App. pp. 13-14). Moreover, even if such reliance were alleged, inconsistencies between the record and the allegations of a complaint are resolved in favor of the record. *In re Woodmar Realty Co., supra* at 788.

Petitioners also accuse the Seventh Circuit of misstating the record. In an attempt to evidence an investment in a common venture as required by *Forman, supra,* 421 U. S. at 852, petitioners had argued that Mr. Poloway "was entitled to 20% of the *gross profits of NSM*". (Pet. p. 18) (emphasis added). However, the Seventh Circuit found from its review of the record that Mr. Poloway was entitled only to a 20% commission on *sales.* (Pet. App. pp. 12-13). The Seventh Circuit was correct.

The employment agreement between ECC and Mr. Poloway provides in pertinent part as follows:

> ADDITIONAL COMPENSATION TO EMPLOYEE
>
> 4. Employee shall receive as additional compensation for the services rendered on behalf of Company a commission on the sale of new boats, commissions on brokerage sales, and accessories in the amount of 20% of gross profit, as hereinafter defined.
>
> "Gross Profit" is defined as sales price less the cost of the item sold, sales tax, labor included in sales price, freight charges, returns and allowances, and other similar type matters in the discretion of Company.

(Resp. App. p. 43a).

It is petitioners who misstate the record.

CONCLUSION

The petition is woefully lacking in merit in several significant respects: the decision of the Seventh Circuit is not in conflict with the decisions of this Court or other federal courts of appeal on the same matter or question, as required by Supreme Court Rule 17-1(a) and (c); petitioners fail to state the essential facts material to the consideration of the questions presented, as required by Supreme Court Rules 21-1(g) and 21-5; and petitioners fail to present with accuracy, brevity and clarity those matters essential to a ready and adequate understanding of the points requiring consideration, in dereliction of Supreme Court Rule 21-5.

This case belongs in state court where it was first brought by respondent.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. HOUGH
DONALD C. SHINE
MICHAEL H. MOIRANO
Attorneys for Respondent

HOWINGTON, ELWORTH, OSSWALD & HOUGH
135 South LaSalle St., Suite 3910
Chicago, Illinois 60603
312/346-7900

APPENDIX

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEFFREY E. FREDERIKSEN, individually, and EMERALD CITY CORPORATION, an Illinois corporation, *Plaintiffs* vs. EDWARD T. POLOWAY *Defendant.*	Civil Action Jury Demanded

COMPLAINT

NOW COME the Plaintiffs, JEFFREY E. FREDERIKSEN ("FREDERIKSEN") and EMERALD CITY CORPORATION (hereinafter "ECC"), an Illinois corporation, by their attorneys, Paul Bernstein, Henry A. Waller and Mark H. Schiff, and for their complaint against Defendant, EDWARD T. POLOWAY, state as follows:

PARTIES

1. Plaintiff EMERALD CITY CORPORATION, is an Illinois corporation with its principal place of business in Lake County, Illinois.

2. Plaintiff, JEFFREY E. FREDERIKSEN, resides at 603 West Haven Drive, Arlington Heights, Illinois.

3. Defendant EDWARD T. POLOWAY, resides at Nine Center Street, Waukegan, Illinois.

JURISDICTION

4. The cause of action stated in Count I arises under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 USC § 78j(b) (1976), and Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder, 17 CFR § 240.10(b)-5.

5. This court has jurisdiction over Count I pursuant to Section 27 of the Exchange Act, 15 USC § 78aa (1976).

6. The cause of action stated in Count II arises under Sections 12(2) and 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 USC § 771(2), 77q(a) (1976).

7. This court has jurisdiction over Count II pursuant to Section 22(a) of the Securities Act, 15 USC § 77(v)(a) (1976).

8. Jurisdiction over Counts III through V is based on principles of pendent jurisdiction.

STATEMENT OF FACTS

9. At all relevant times mentioned herein, Defendant EDWARD T. POLOWAY, (hereinafter "POLOWAY") was the sole shareholder and director of North Shore Marine, Inc., ("NORTH SHORE"), a Wyoming Corporation, with its principal place of business in Waukegan, Lake County, Illinois.

10. At all relevant times mentioned herein, FREDERIKSEN was the sole shareholder of ECC.

11. At all times relevant hereto, the business of NORTH SHORE was that of selling, repairing, storing and servicing boats at its facilities in Waukegan, Illinois.

12. From on or about August 1, 1978, through October 10, 1978, Plaintiffs and POLOWAY had entered into a period of negotiations for the purchase of assets and certain shares of common stock of NORTH SHORE, during which period POLOWAY offered for sale certain shares of common stock of NORTH SHORE to FREDERIKSEN and ECC.

13. On or about October 14, 1978, POLOWAY sold to ECC certain shares of stock of NORTH SHORE and the assets of NORTH SHORE for a certain consideration and FREDERIKSEN and ECC did enter into certain contracts with POLOWAY, as stated below.

14. In connection with the purchase of assets and certain shares of NORTH SHORE by the Plaintiffs, the following statements were made by POLOWAY to the Plaintiffs, or the following inferences could reasonably be drawn from POLOWAY's statements:

(a) The intangible property of NORTH SHORE was valued at $40,000.00.

(b) Inventory of NORTH SHORE was valued at $90,000.00.

(c) Accounts receivable of NORTH SHORE were valued at $30,000.00.

(d) Defendant was the owner of 100,000 shares of voting common stock of NORTH SHORE, par value $1.00 per share, being all of the issued and outstanding shares of NORTH SHORE.

(e) That he had disclosed accurately and completely a complete statement of NORTH SHORE's financial condition, assets and liabilities.

(f) NORTH SHORE had complied with and performed all it was required to do under all of the rules and regulations of the Federal, State and local governmental bureaus, agencies and departments applicable to NORTH SHORE in the conduct of its business and that NORTH SHORE was in good standing with said agencies.

(g) NORTH SHORE had no contracts or commitments of any nature, kind or description, except certain rental agreements which were provided to Plaintiffs.

(h) NORTH SHORE owned, free and clear of any liens and encumbrances, all of the assets used in its business, tangible or intangible.

15. On or about October 14, 1978, pursuant to POLOWAY'S representations and statements, Plaintiffs did enter into certain contracts with POLOWAY, both individually and in his capacity as sole shareholder of NORTH SHORE, as reflected in the following documents listed below and attached hereto and made a part hereof:

(a) Management Agreement dated October 14, 1978 attached hereto as Exhibit A.

(b) Agreement to purchase all of the assets of NORTH SHORE dated October 14, 1978 attached hereto as Exhibit B.

(c) Employment Agreement dated October 14, 1978 by and between EMERALD CITY CORPORATION and EDWARD T. POLOWAY attached hereto as Exhibit C.

(d) Agreement to purchase 10% of the issued and outstanding shares of NORTH SHORE dated October 14, 1978, attached hereto as Exhibit D.

16. POLOWAY failed to state or disclose to FREDERIKSEN and ECC the following in connection with the agreements entered into as mentioned above and in connection with the sale of certain NORTH SHORE stock by POLOWAY to ECC and FREDERIKSEN:

(a) The tangible personal property sold to the purchasers was of significantly less value than $40,000.00.

(b) The inventory which had been purchased at a value of $90,000.00 was in actuality no more than $10,000.00 worth of inventory.

(c) The accounts receivable valued at $30,000.00 were substantially less than that figure.

(d) The accounts payable which had been represented by POLOWAY were significantly greater than the purchaser had been advised.

(e) The value of the entire asset package purchased by the Plaintiffs was very significantly less than represented to the Plaintiffs.

17. As a result of the foregoing, the interest of Plaintiffs in NORTH SHORE purchased from POLOWAY have no value.

COUNT I
CLAIMS UNDER THE EXCHANGE ACT

1. The stock and other interests purchased by Plaintiffs as set forth above are "securities" within the meaning of Section 3(a)(10) of the Exchange Act.

2. POLOWAY used the mails, telephone, and other instrumentalities of interstate commerce in connection with the sale of said securities to Plaintiffs.

3. Plaintiffs were induced to purchase said securities in reasonable reliance upon the representations of POLOWAY.

4. POLOWAY induced Plaintiffs to purchase said securities by misrepresentations of material facts, misleading statements of material facts, and omissions to state material facts, as hereinabove set forth.

5. POLOWAY's acts and omissions constitute a violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

6. As a result, Plaintiffs have been damaged in the sum of $1,250,000.00 that they have been induced to invest and in lost profits due to POLOWAY's acts and omissions.

WHEREFORE, Plaintiffs respectfully demand judgment against Defendant POLOWAY in the amount of $1,250,000.00 plus reasonable attorneys' fees, and costs of suit.

COUNT II

CLAIMS UNDER THE SECURITIES ACT

1. The stock and other interests purchased by Plaintiffs as set forth above are "securities" within the meaning of Section 2(1) of the Securities Act.

2. POLOWAY used the mails, telephone, and other instrumentalities of interstate commerce in the offer and the sale of securities to Plaintiffs.

3. Plaintiffs were induced to purchase said securities in reasonable reliance upon the representations of POLOWAY.

4. POLOWAY induced Plaintiffs to purchase said securities by misrepresentations of material facts, misleading statements of material facts, and omissions to state material facts, as hereinabove set forth and for which POLOWAY received money from the Plaintiffs.

5. POLOWAY's acts and omissions constitute violation of Sections 17(a) and 12(2) of the Securities Act.

6. Plaintiffs hereby tender to this court the securities purchased by them from POLOWAY.

7. As a result, Plaintiffs have been damaged in the sum of $1,250,000.00 that they have been induced to invest due to POLOWAY's acts and omissions.

WHEREFORE, Plaintiffs respectfully demand judgment against Defendant POLOWAY in the amount of $1,250,000.00 plus reasonable attorneys' fees, and costs of suit.

COUNT III
CLAIMS UNDER THE ILLINOIS SECURITIES LAW

1. The stock and other interests in NORTH SHORE purchased by Plaintiffs from Defendant are "securities" within the meaning of Section 2.1 of the Illinois Securities Law of 1953, Ill. Rev. Stat. Ch. 121-1/2, § 137.2-1 (1977) (hereinafter the "Securities Law").

2. POLOWAY is an issuer, controlling person and/or underwriter with respect to the sale of said securities, within the meaning of Sections 2.2, 2.4 and 2.6 of the Securities Law.

3. The securities purchased by Plaintiffs were not registered under Section 5 of the Securities Law prior to their sale in the State of Illinois.

4-6. Plaintiffs reallege Paragraphs 2 through 4 of Count I as Paragraphs 4 through 6 of Count III as if fully set forth herein.

7. Defendant's acts and omissions constitute violations of Section 12 of the Securities Law.

8. Plaintiffs elect to rescind the sale to them of all securities as hereinabove set forth pursuant to Section 13 of the Securities Law and tender to the court all securities sold to them pursuant to Section 13(A) of the Securities Law.

WHEREFORE, Plaintiffs respectfully demand judgment against Defendant POLOWAY, in the amount of $1,250,000.00 plus reasonable attorneys' fees and costs of suit.

COUNT IV
CLAIM FOR COMMON LAW FRAUD

1-2. Plaintiffs reallege Paragraphs 3 and 4 of Count I of their Complaint as Paragraphs 1 through 2 of Count IV of their complaint as if fully set forth herein.

3. POLOWAY knew or should have known that his representations as hereinabove set forth were false, or that his representations were made in reckless disregard of the truth.

4. As a result, Plaintiffs have been damaged in the sum of $1,250,000.00 representing the amounts they have been induced to invest and pay due to POLOWAY's acts and omissions.

WHEREFORE, Plaintiffs respectfully demand judgment against Defendant in the amount of $1,250,000.00 plus interest, reasonable attorneys' fees, and costs of suit, and punitive damages in the sum of $5,000,000.00.

COUNT V
CLAIM FOR BREACH OF CONTRACT

1. On or about October 14, 1978, ECC and Defendant entered into certain contracts, copies of which contracts are attached hereto as Exhibits A—D and made a part hereof.

2. Pursuant to the terms and conditions of the contracts, Defendant agreed to do certain acts, including, but not limited to, the following:

(a) To devote his full time and best efforts to NORTH SHORE and to operate within the goals and policies of NORTH SHORE;

(b) To deliver to Plaintiffs a bill of sale including certain exhibits listing and detailing the tangible property and inventory owned by NORTH SHORE and to be conveyed to Plaintiffs;

(c) To deliver to Plaintiffs certain financial information and lists of contracts in connection with NORTH SHORE and to deliver to Plaintiffs all papers, books and records of NORTH SHORE.

3. Defendant made certain warranties to Plaintiffs, which warranties are contained in Exhibit B, pages 9-17.

4. FREDERIKSEN personally guaranteed the performance of all the terms and conditions by ECC pursuant to the terms of the contracts.

5. Plaintiffs have duly performed all the conditions under the contract required to be performed by them.

6. POLOWAY has failed and refused to perform his conditions and obligations under the contracts, including, but not limited to, the following:

(a) Defendant has refused to devote his full time and best efforts to NORTH SHORE and has failed to operate within the goals and policies of NORTH SHORE; and,

(b) Defendant has failed to deliver to Plaintiffs the Exhibits required under the Bill of Sale or to deliver to Plaintiffs the financial information, list of contracts, books or records of NORTH SHORE as required under the contracts.

7. POLOWAY has further breached the contracts by breaching numerous warranties as contained in Exhibit B of this Complaint, by, among other things:

(a) Non-compliance with certain regulations and rules of the U.S. government in failing to pay certain payroll taxes due to the U.S. government and failing to disclose this failure to Plaintiffs;

(b) Failing to disclose to Plaintiffs certain threatened or pending litigation in connection with NORTH SHORE;

(c) Failure to disclose that any financial information previously given to Plaintiffs was an incomplete and inaccurate statement of the financial condition of NORTH SHORE;

(d) Failure to deliver to Plaintiffs all papers, books, records and other property at or before the closing date of the contracts;

(e) Participated in transactions not in the usual and regular course of the business of NORTH SHORE;

(f) Failure to disclose to Plaintiffs certain material facts necessary for Plaintiffs to determine their desire to consummate the transaction.

8. The failure and refusal of POLOWAY to perform the above obligations has caused the Plaintiffs damages in the sum of $1,250,000.00

WHEREFORE, Plaintiffs demand judgment against Defendant in the amount of $1,250,000.00 plus interest, reasonable attorneys' fees, and costs of suit.

JEFFREY E. FREDERIKSON
EMERALD CITY CORPORATION

By /s/ Mark H. Schiff
One of their Attorneys

OF COUNSEL:

Bernstein & Waller
123 W. Madison
22nd floor
Chicago, Illinois 60602
(312) 782-8400

AGREEMENT

THIS AGREEMENT is made on October 14, 1978, between NORTH SHORE MARINE, INC., a Wyoming corporation, qualified to do business to in the State of Illinois (hereinafter for convenience referred to as "SELLER"), Edward T. Poloway who is the owner of 100% of the issued and outstanding common stock of NORTH SHORE MARINE, INC. (hereinafter for convenience being referred to as "SHAREHOLDER") and EMERALD CITY CORPORATION, an Illinois corporation (hereinafter for convenience referred to as "PURCHASER" or "BUYER").

WITNESSETH:

WHEREAS, Seller is the owner of certain assets which Purchaser desires to purchase; and,

WHEREAS, the parties hereto desire to set forth their understandings and agreements in this document, and to cause the sale and purchase of said assets upon the representations, warranties, agreements, terms and conditions herein set forth;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

1. AGREEMENT TO SELL AND PURCHASE

SELLER agrees to convey to PURCHASER, at the time of closing, by a Bill of Sale, assignments and other appropriate documents as required by counsel for Purchaser, all of the assets owned by NORTH SHORE MARINE including properties currently under lease, or to be leased from the Elgin, Joliet and Eastern Railway and those located at the General Joseph A. Teece Pavilion, the land adjoining said Pavilion, extending to the South Line of Madison Street; the land between said

building and the West line of Harbor Place; the land South and West adjoining said Pavilion, in Waukegan, Illinois, consisting of the following:

(a) *Tangible Property*—As itemized on Exhibit "A" attached hereto and by reference made a part hereof and, without limiting the foregoing, any and all other tangible property presently on the premises occupied by Seller which are not the property of third parties.

(b) *Inventory*—As itemized on Exhibit "B" attached hereto and by reference made a part hereof and, without limiting the foregoing, any and all other inventory type items and all other tangible property and supplies, presently on the premises occupied by Seller which are not the property of third parties.

(c) *Name, Telephone Number and Listings and Good-Will*—The use of the name NORTH SHORE MARINE, or any similar names, together with all of SELLERS' interest to the SELLERS telephone number, SELLERS listings in telephone books and directories, and good-will connected with the SELLERS' business operation.

(d) *Franchise Agreements, Leases, Contracts and Contract Rights*—All franchise agreements, leases, contracts and contract rights as itemized on Exhibit "C" attached hereto and by reference made a part hereof: True and correct copies of such agreements and any all amendments thereto are attached as part of Exhibit "C".

(e) *Accounts receivable*—All accounts receivable.

2. PURCHASE PRICE

PURCHASER agrees to purchase those assets as listed in paragraph 1 above for the sum of the prices set forth below.

(a) *Tangible Property*—For the assets listed at paragraph 1(a) above the sum of $40,000.00.

(b) *Inventory*—For the assets listed at paragraph 1(b) above a sum equal to $90,000.00.

(c) *Name, Telephone Number and Listings and Good-Will*—For the assets listed at paragraph 1(c) above the sum of $3,000.00.

(d) *Franchise Agreements and Leases, Contracts and Contract Rights*—For the assets listed in paragraph 1(d) above the sum of $28,800.

(e) *Accounts Receivable*—In the amount of $30,000.00.

(f) SELLERS represent and warrant that all trade accounts payable shall be paid by SELLERS prior to or at closing as per Exhibit "D" attached and that said Exhibit is a full, true and correct statement of trade accounts payable.

3. PAYMENT

Subject to all representations and warranties made by SELLER hereunder, at the closing and from time to time thereafter, the payment of the purchase price as determined above will be made to SELLER as follows:

(a) The sum of $160,000.00 to be paid into escrow upon the mutual execution of this Agreement.

(b) The aforesaid sum shall be used to pay all trade accounts payable and all other indebtedness of SELLER of any kind, nature and description, provided closing has occurred and shall be maintained for six months from the date of deposit to cover unknown liabilities. Thereafter, the balance shall be paid to Seller.

(c) The balance of the purchase price, without interest, will be paid in equal monthly installments over a period of 3 years, the first payment being due and payable one year from signing this Agreement.

(d) BUYER shall have the right to prepay any sum or sums due hereunder from time to time without penalty.

4. TIME AND PLACE OF CLOSING AND PROCEDURES FOR CLOSING

The closing date shall be November 15, 1978 at the hour of 1:00 P.M. in the escrow offices of The Bank of Waukegan which may be changed by mutual consent of the parties.

(a) *Transfer of Assets*—SELLER will convey all property and assets of the business to PURCHASER by delivering to PURCHASER Warranty Bills of Sale and other documents, as conditions precedent to closing, as follows:

(i) A Bill or Bills of Sale warranting SELLER to be the owner of and covering, free and clear of all liens and encumbrances of any kind or nature whatsoever, all assets described in paragraphs 1(a), (b) and (c) of this agreement. Seller shall deliver within 7 days prior to closing, Uniform Commercial Code searches confirming that all property is free and clear of encumbrances of any kind or nature.

(ii) Assignments of all equipment leases, franchise agreements, dealer agreements, to be assigned to PURCHASER with consents from third parties as may be required for the assignment and transfer to the PURCHASER of any such of SELLERS leases and franchises. Specifically, and without limiting the foregoing, the affirmative, written consent of Chris-Craft Corporation, Outboard Marine Corporation, Mercruiser, Volvo and dated April 2, 1973, out if in conflict, this agreement shall be deemed appropriately modified so that such lease is continued in full force and effect.

Balboa sailboats under franchise or dealer agreements shall be obtained prior to closing as a condition precedent to closing. The said written consents shall be in form and contents acceptable to Purchaser's attorneys.

(iii) Assignment in form and content acceptable to Purchaser's attorneys of a certain exchange agreement dated September 19, 1978 by and between Seller and Elgin, Joliet and Eastern Railway company, the subject matter of which is 66,246 square feet of property located in Waukegan, Illinois and a certain lease entered into by the parties dated September 15, 1978 for the same premises. SELLER warrants that said lease and agreement are in full force and effect and SELLER is not in default of any of the terms contained therein.

SELLER will on or after closing, execute and deliver any other documents as may be reasonably necessary to transfer, or further perfect title to the assets transferred to PURCHASER.

(b) *Books and Records*—So as to assist Purchaser in the conduct of the business and its continuity, at the time of closing, SELLER shall deliver to BUYER, all books, records and other documents in SELLERS possession or control or in possession or control of SELLER's accountant, attorneys and agents relating to the past, present or future conduct of the business, including, but not limited to all corporate minute books, stock record books, ledgers, journals, subsidiary ledgers and statements and all files and correspondence, rental agreements, brokerage and new boat sale agreements, paid bills, unpaid bills, last 5 years of federal and state income tax returns if available and sales tax returns, customers' accounts, customers' lists, customers' records, uncollected accounts receivable information, invoices, purchase orders, payroll tax returns for last 5 years if available and each and every and all other documents used, held, owned or possessed by SELLER during the course of its business, except for any such items of a personal nature belonging to SELLER. However, SELLER may retain copies of and shall continue after closing to have reasonable access to any books, records or other documents.

5. LIABILITIES

The Seller, upon Buyer's deposit into escrow shall furnish to the BUYER a written list of the names and addresses of the creditors of the SELLER and the amount of indebtedness due or owing to each as certified by the SELLER and the SHAREHOLDER under oath to be a full, accurate and complete list of its creditors and of their indebtedness.

(b) SELLER agrees with BUYER that it will for a period of 5 years from the date of closing save harmless and keep indemnified the BUYER, its assigns and its successors from and against all losses, costs, expenses and damages which may arise from the failure of SELLER to fully, accurately and completely comply with the provisions of this paragraph 6.

(c) If liens, notices of seizure or similar notifications are issued or served by the Internal Revenue Service, Illinois Department of Revenue, the Illinois Department of Labor or any other governmental agency against Seller or any of the assets which are the subject matter of this Agreement then the sum of liens or similar notifications shall be withheld and retained until a final determination has been reached by all of the governmental agencies or determination by such governmental agencies that SELLER is not subject to any federal taxes, sales or use tax or unemployment tax at which time such cash shall be delivered to SELLER. The PURCHASER is hereby authorized to pay any federal taxes, sales, use tax or unemployment tax then due; such payments to be applied against the balance of the purchase price. SELLER reserves the right within 10 days of any stop order to apply for a reduction thereof.

(d) A portion of the escrow account shall be used to cover the amount of all taxes, penalties and interest which may be due the State of Illinois from SELLER under any and all sales, use, and occupation tax statutes or for which the BUYER may be contingently liable under Section 444j of Chapter 120 of the

Illinois Revised Statutes (1971). SELLER shall deliver to BUYER at closing a receipt or certificate from the Illinois Department of Revenue, dated subsequent to the date of this Agreement, showing all such taxes, penalties or interest have been paid or that no such tax, penalty or interest is due from SELLER or if a stop order is issued to BUYER and it has been subsequently withdrawn. Any withholding of funds shall not relieve SELLER from liability for any taxes, penalties and interest which may be due the United States government and the State of Illinois from SELLER, and SELLER agrees to indemnify and hold BUYER harmless in respect of any such taxes, penalties and interest which may be paid or collected from BUYER.

6. WARRANTIES OF SELLER AND SHAREHOLDER

SELLER and the SHAREHOLDER jointly and severally represent and warrant to PURCHASER now and as of the closing and thereafter for a period of 5 years from the date of closing as follows, upon which warranties PURCHASER is relying:

(a) That SELLER is duly organized, validly existing and in good standing under the laws of the State of Wyoming and is duly qualified to do business in the State of Illinois and has corporate power to carry on its business as is now being conducted and is duly qualified to do business and is in good standing in each jurisdiction where, by the nature of the business transacted by it, such qualification is necessary.

(b) That SELLER has no subsidiaries or affiliates.

(c) That SELLER's entire authorized capital stock consists of 100,000 shares of voting common stock, par value $1.00 per share of which there is presently issued and outstanding 100,000 shares, all of which are owned by SHAREHOLDER. That there are no other classes of stock and that all of the issued shares have been validly issued and are fully paid and non-assessable and that there are no existing options, contracts,

conversion rights, demands or claims of any sort relating to any of the authorized or issued stock of SELLER.

(d) That the financial information of SELLER previously delivered to PURCHASER copies of which are attached hereto as Exhibit "F", represent a true and complete statement of SELLER's financial condition, assets and liabilities, and of the operation for the period indicated, including income tax liabilities, that the financial statements have been prepared in accordance with generally accepted accounting principles applied on a consistent basis, and that inventories are accurately stated at the lower of cost or market value.

(e) That there have been no changes of any kind in the assets or business of the SELLER since the most recent date appearing on the financial information referred to above.

(f) That there has been no default or penalty incurred under any lease or other agreement or obligation of SELLER.

(g) That SHAREHOLDER is the owner, free and clear of any liens or encumbrances of any kind of the number of shares of SELLER's common stock set forth herein and that there are no restrictions in writing or otherwise which will in any way limit the exercise of Seller's obligations imposed by this Agreement.

(h) That SELLER is not a party to any employment contract with any officer, director or employee.

(i) That SELLER has complied with and performed under all of the rules and regulations of the Federal, State and local Governmental Bureaus, Agencies and Departments applicable to SELLER in the conduct of its business and is in good standing;

(j) That SELLER, at the date hereof, has no contract or commitments of any nature, kind or description, except certain rental agreements referred to in Exhibit "G" attached, copies of which leases are also attached hereto.

(k) That there is no litigation or proceeding pending or threatened against or relating to SELLER or SHAREHOLDER, its properties or business, nor are there any judgments existing or tax liens against SELLER or SHAREHOLDER in any Court, nor are there any replevins, attachments or executions issued against it now in force, except as set forth in Exhibit . SELLER and SHAREHOLDER will deliver, at closing, Judgment and Tax Lien Searches confirming this warranty, which shall not relieve SELLER and SHAREHOLDER of the warranties made herein.

(l) That from the date hereof to the closing hereof, SELLER covenants and agrees that there will not be:

(i) Any changes in SELLERS financial condition, assets, liabilities or business other than changes in the regular, normal and ordinary course of business, none of which shall be adverse to the business or financial condition of SELLER.

(ii) Any change will be made in SELLER's Certificate of Incorporation or By-Laws except as may be first approved in writing by counsel for PURCHASER.

(iii) Contracts or commitments entered into by or on behalf of SELLER without PURCHASER's prior written approval.

(iv) Suffered any extraordinary loss in the assets or conduct of the business or waived or released any right of substantial value to the business;

(v) Any increase in salaries or wages to employees of the business above scales existing sixty (60) days prior to the date of this agreement or pay any bonuses or unusual compensation to agents or employees, or made any agreements with respect thereto;

(vi) Entered into any transaction in connection with or in respect of the business, except in the ordinary course of business; or

(vii) Made any change in the price or discount schedule at which the products, goods and services of the business are sold.

SELLER agrees to keep PURCHASER apprised of any notices of violations or hearings concerning same from any governmental agencies and any litigation instituted or threatened against SELLER, or any facts affecting SELLER.

(m) That since the date of the most recent financial information delivered to Purchaser there has been no material adverse change in the financial condition of the business nor any other material adverse change in the condition of SELLER'S business, including its business organization, personnel, properties or relationships with manufacturers, lessors, suppliers, employees, unions, customers or others.

(n) That SELLER is not a party to any written or oral continuing contract or agreement for the purchase or sale of materials, supplies, services, machinery or equipment by or in connection with the business.

(o) That all papers, books, records and property belonging to SELLER are in its possession and will be delivered to PURCHASER at closing and that no officer, director or counsel has in his or their possession, or under his or their control, any of the property, books or records belonging to SELLER, except for temporary business purposes.

(p) SELLER owns, free and clear of any liens and encumbrances, all of the assets used in its business, tangible or intangible.

(q) There are no other contracts, labor agreements, employment agreements, leases or obligations of SELLER or affecting any of its property, except as shown in Exhibits attached hereto.

(r) SELLER has not, and subsequent to the date hereof and on the closing date shall not have sold, exchanged, pledged, mortgaged or otherwise encumbered any of its property, or participated in any transaction not in the usual and regular course of its business.

(s) That the SELLER and SHAREHOLDER will deliver to PURCHASER an opinion from SELLER's counsel, dated as of the closing date, in form and substance satisfactory to Purchaser's attorneys that SELLER's corporate existence, good standing and authorized and issued stock are as hereinbefore stated; that SELLER has good marketable title to all of its property and assets, except as to liens otherwise stated; that they do not know, or have any reasonable grounds to know of any litigation, proceeding, or governmental investigation pending or threatened against, or relating to SELLER, its properties or business except, as otherwise stated herein, and that:

(i) SELLER is duly authorized to transact business under the name of NORTH SHORE MARINE, INC, in the State of Wyoming and is duly qualified to do business in the State of Illinois;

(ii) The parties signing this Agreement on behalf of SELLER are duly authorized to execute, deliver and consummate this Agreement;

(iii) This Agreement will not conflict with, result in a breach of the terms and conditions of, accelerate any provision of or constitute any default under the Articles of Incorporation, any amendment or any By-Law;

(iv) This Agreement has been executed and delivered by SELLER and constitutes a legal, valid, binding and enforceable obligation of SELLER in accordance with its terms;

(v) The assets sold will, on delivery to BUYER in accordance with the terms of this Agreement, be held by BUYER free and clear of any liens, claims, charges or encumbrances except as otherwise stated herein.

(t) That there have been *no* omissions to advise PURCHASER, its officers and agents, of any material fact necessary for PURCHASER to determine its desire to enter into this agreement.

(u) That the agreements, representations, covenants and warranties contained herein shall be correct as of the closing date and for 5 years thereafter with the same force and effect as though such agreements, representations, covenants and warranties had been made on said closing date, except for such changes as occur in the usual and regular course of business.

(v) All physical properties and assets of the business being sold are covered by insurance in reasonable amounts and SELLER carries public liability, workmen's compensation, product liability and other usual types of insurance in reasonable amounts.

(w) The machinery and equipment of the business is and at closing will be in good working order and repair and the inventory of parts for such machinery and equipment is usable in the machines or with the equipment and the parts inventory and the merchandise inventory is not in excess of the normal business requirements of the business.

(x) SELLER owns, or possesses adequate licenses or other rights to use all patents, trademarks, tradenames and copyrights necessary to conduct or use in the business as now operated or presently proposed to be operated without known conflict with asserted rights of others all of which shall be assigned to PURCHASER at closing.

(y) SELLERS will comply with all the requirements and conditions of the Wyoming Statutes and all applicable statutes covering the transaction relative to the sale of the assets of the corporation by the date of closing and will deliver to Purchaser proper certified copies of resolutions as required by such Acts in form and content acceptable to Purchaser's attorneys.

(z) As of the closing date hereof, SELLER will have paid, prior to delinquency, all bills for utilities, including, but not limited to, oil, water, power, telephones, and sewerage services, save and except bills for the then current period not yet due.

(aa) That there are no pension or profit sharing plans in existence.

7. GENERAL AGREEMENTS OF THE SHAREHOLDER

The SHAREHOLDER agrees with the PURCHASER, their successors or assigns as follows:

(a) The SHAREHOLDER agrees to cause the SELLER prior to the closing date, to operate its business in its usual manner (except only as otherwise provided in this agreement) and to maintain its property in good operating condition, and not to permit SELLER to sell or dispose of its property or to acquire any additional property (except in the ordinary course of its usual business), and to consult with PURCHASER before deciding or acting upon any question of more than routine importance which may arise in connection with the business of the SELLER.

(b) Immediately upon the signing of this Agreement, SELLER will deliver to PURCHASER for inspection by it or its counsel, accountants or nominees all accounting books and records of the SELLER, the corporate minute book of the SELLER, the stock certificate book of the SELLER, the original Charter (and any Amendments thereto) of the SELLER, the certificate of authority to do business in Illinois, any lease or written contract to which the SELLER is a party, and all other documents and records pertaining to the SELLER and its business which might be requested by the PURCHASER for approval by PURCHASER'S counsel.

(c) The SHAREHOLDER will defend, indemnify, save and keep the SELLER and PURCHASER harmless of and from any and all claims and liabilities made or asserted in connection with any action or transaction of the SELLER occurring prior to the Closing Date for which claim is made against Purchaser, except for claims or liabilities incurred in the ordinary course of the SELLERS business subsequent to the date hereof which Seller shall satisfy.

8. CONDITIONS TO OBLIGATIONS OF BUYER

The obligations of PURCHASER are subject to the following conditions, any of which the BUYER may, in writing only, at its election not enforce or waive.

(a) That BUYER will have received the opinion of SELLERS' counsel as hereinabove described.

(b) That all the warranties made herein by SELLER and SHAREHOLDER are true and correct at the closing date and for 5 years thereafter.

(c) There shall not have been any materially adverse change in SELLER'S assets or condition, financial or otherwise (including without limitation its personnel, properties or relationships with employees, unions, suppliers, customers or others) between the date 60 days prior to this Agreement and the date of closing. A casualty loss, insured or uninsured, in excess of $2,500. shall be considered a materially adverse change in the SELLER'S condition.

(d) SELLER will maintain its property, including machinery and equipment, in at least as good condition and repair as it is the date of this Agreement and will not voluntarily suffer anything to be done that will decrease the value of its property, ordinary wear and tear excepted.

(e) There shall have been fully executed at closing an employment agreement for five years containing a consulting agreement and covenants not to compete for two years thereafter, with payments as provided for therein, with Edward T. Poloway as per the form of agreement attached hereto as Exhibit " ".

(f) That BUYER will provide SELLER at closing tax receipts showing all personal property taxes billed for 1977 and prior years as having been paid.

(g) Counsel for PURCHASER will approve the form, substance and sufficiency of all instruments to be delivered by SELLER at or before closing.

(h) PURCHASER may, by written notice to SELLER, waive breach of or noncompliance with any condition, covenant, representation or warranty by SELLER and SHAREHOLDER or noncompliance with any condition upon PURCHASER's obligation to purchase, and PURCHASER may elect to close notwithstanding such breach or noncompliance. This election to close shall not constitute a waiver by PURCHASER of any rights it may have to claim money damages in respect to any loss or damage incurred by it or by the business and caused directly or indirectly by the breach or noncompliance by SELLER and/or SHAREHOLDER.

(i) PURCHASER shall have first obtained any and all licenses, permits approvals from municipal, local, state and federal authorities to carry on the business.

9. HOLD HARMLESS AGREEMENT OF SELLER AND SHAREHOLDER

SELLER and SHAREHOLDER hereby agree to indemnify and hold harmless PURCHASER, their successors and assigns of and from any and all claims, damages, actions, causes of actions, debts or any and all claims of any kind or nature whatsoever arising out of, growing out of or incident to any breach of any of the representations, and, or, warranties made by SELLER and SHAREHOLDER hereunder, and more particularly without limiting the generality of the foregoing, SELLER and SHAREHOLDER agree to indemnify and hold the PURCHASER, their successors and assigns harmless of and from any and all of the following:

(a) Any and all claims made against PURCHASER, its or their successors or assigns growing or arising out of transactions to which SELLER was a party.

(b) Any and all of the Federal government, municipal, State or other governmental body for taxes of any kind or nature whatsoever.

(c) Any and all other claims against PURCHASER or its successors, or assigns.

This indemnification and hold harmless agreement includes not only damages to PURCHASER, its successors or assigns or expenditures of money made by them but also to include all court costs, costs, and reasonable attorneys' fees, and any other professional fees incurred as a result of any claim or claims whether as a result of any proceeding, investigation, settlement, court action, judgment or otherwise. Seller will have the right to participate in the defense of any claims.

10. SUCCESSORS

This Agreement shall be binding upon and inure to the benefit of the heirs, legal representatives, successors and assigns of SELLER, SHAREHOLDER and PURCHASER.

11. NOTICES

All notices shall be in writing and delivered in person or sent by certified or registered mail, if to SELLER addressed to: John W. Hough, 135 So. LaSalle Street Chicago, Illinois

AND IF TO BUYER, ADDRESSED TO:

Frank J. Seifert, 104 Kenilworth West, Prospect Heights, Illinois and Henry A. Waller, 111 East Wacker Drive, 4th floor, Chicago, Illinois, 60601 or to such other address as is stated in a written notice given in compliance under this clause.

12. HEADINGS:

The various headings used in this Agreement as headings for sections or otherwise are for convenience only and shall not be used in interpreting the text of the section in which they appear.

13. GOVERNING LAW

This Agreement shall be construed and interpreted in accordance with the law of Illinois.

14. SEVERABILITY

The invalidity of any provision of this Agreement shall not impair the validity of any other provision. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable, that provision will be deemed severable and the agreement may be enforced with that provision severed or as modified by the court.

15. ENTIRE AGREEMENT AND MODIFICATION

This Agreement sets forth the entire understanding of the parties. It may only be amended, modified or terminated by an instrument signed by the parties.

16. COUNTERPARTS

This Agreement is executed in several counterparts; each of which shall be deemed to be and shall constitute one and the same instrument.

17. CHANGE OF SELLERS CORPORATE NAME

SELLER agrees that at the closing, it will assign SELLER'S corporate name to PURCHASER and deposit all necessary documents to accomplish the same.

18. DEFAULT

If SELLER defaults in performing this contract, PURCHASER will have all remedies available to it in law or equity to enforce this Agreement.

19. ENFORCEMENT

SELLER and SELLER's shareholder in approving this contract acknowledge that the separate covenants not to compete is reasonable. It is recognized that damages in the event of breach of said covenant will be difficult or impossible to ascertain and SELLER and SHAREHOLDER agrees that in addition to, and without limiting any other remedy or right

PURCHASER may have, PURCHASER shall have the right to an injunction against SELLER or SHAREHOLDER, issued by a court of competent jurisdiction enjoining any breach.

20. CONTINUING EFFECT OF WARRANTIES

All covenants, agreements, representations and warranties made herein and in certificates or other instruments delivered subsequent hereto or at the closing pursuant hereto shall be deemed to be material and to have been relied upon by PURCHASER, notwithstanding any investigation heretofore or hereafter made by PURCHASER or on PURCHASER's behalf and shall survive any closing hereunder for a period of 5 years from the date of contract.

SELLER and buyer have caused their names to be signed by their proper officers and their corporate seals to be affixed all on the date above.

NORTH SHORE MARINE, INC.

By: /s/ Edward T. Poloway
President

SELLER

ATTEST:

_____
Secretary

EMERALD CITY CORPORATION

By: /s/ Jeffrey E. Frederiksen
President

PURCHASER

ATTEST:

_____

Secretary

/s/ Edward T. Poloway

Edward T. Poloway, personally

SHAREHOLDER

III. AGREEMENT

This agreement, made and entered into this 14th day of October, 1978 by and between Emerald City Corporation, an Illinois Corporation, and Edward T. Poloway;

WHEREAS, Edward T. Poloway is the sole shareholder of the issued and outstanding stock of North Shore Marine, Inc.; and

WHEREAS, there presently exist an agreement to purchase the assets of North Shore Marine, Inc., by and between Emerald City Corporation and North Shore Marine, Inc.; and

WHEREAS, it is desired by Emerald City Corporation to purchase ten per cent (10%) of the issued and outstanding stock of North Shore Marine, Inc.; and

WHEREAS, it is in the best interest of the parties to create a voting trust for the remaining ninety percent of the issued and outstanding stock of North Shore Marine, Inc.;

NOW THEREFORE, in consideration of the mutual agreement and covenants contained herein, it is mutually agreed and covenanted by and between the parties hereto as follows:

ARTICLE I

AGREEMENT TO PURCHASE STOCK

For the consideration of ten dollars ($10.00), Emerald City Corporation (hereinafter "ECC") agrees to purchase and Edward T. Poloway (hereinafter "Poloway"), sole shareholder of North Shore Marine, Inc., agrees to sell, ten per cent of the issued and outstanding stock of North Shore Marine, Inc.

EXHIBIT B

ARTICLE II

VOTING TRUST

The parties agree that for the further consideration of ten dollars ($10.00), the remainder of the outstanding stock of North Shore Marine, Inc., held by Poloway will be placed in a voting trust, the terms of such trust being attached hereto and made a part hereof as Exhibit "A", with Frank J. Seifert as voting trustee.

ARTICLE III

RESIGNATIONS

Effective upon the date hereof, Edward T. Poloway will tender his resignations as an officer and director of North Shore Marine, Inc., and will cause any and all remaining directors and/or officers to tender their resignations at the same time.

ARTICLE IV

REDEMPTION

It is hereby agreed by and between the parties that upon the consummation of the purchase of assets of the corporation by ECC and the termination of all of the Seller's warranties under the contract for the sale of assets, or earlier at the option of ECC, North Shore Marine, Inc. will cause to be redeemed the remaining ninety per cent of its issued and outstanding stock in the hands of Poloway. The redemption price shall be equal to the net cash proceeds.

IN WITNESS WHEREOF, the parties hereto have executed or caused to be executed this agreement the day and year first above written.

EMERALD CITY CORPORATION

/s/ Edward T. Poloway
Edward T. Poloway

By /s/ Jeffrey E. Frederiksen
Jeffrey E. Frederiksen

NORTH SHORE MARINE, INC.

VOTING TRUST AGREEMENT

THIS AGREEMENT, dated as of the 14th day of October, 1978, between the undersigned stockholder (hereinafter called "Stockholder") of NORTH SHORE MARINE, INC., a Wyoming corporation (hereinafter called the "Company"), and JEFFREY E. FREDERIKSEN and successors as Voting Trustee (hereinafter called the "Trustee");

W I T N E S S E T H :

WHEREAS, the Stockholder is the owner and holder of record of 90% or 90,000 shares of the Common Stock, $1.00 par value, of the company; and

WHEREAS, the Stockholder deems it to be in the best interest of the Company and its present and future Stockholders that the voting power of the shares so held should be unified during the period of this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, it is agreed as follows:

FIRST: The Stockholder hereby assigns, transfers and delivers to the Trustee 90,000 shares of the Common Stock of the Company owned by him, as evidenced by a certificate(s) # therefor duly endorsed for transfer such shares to be held and disposed of by the Trustee under and pursuant to the terms and conditions of this Agreement.

SECOND: The Trustee hereby promises and agrees with the Stockholder that the Trustee will issue, or cause to be issued, to the Stockholder in exchange for the shares of the Common Stock of the Company, assigned, transferred and delivered by him to the Trustee, a voting trust certificate representing the foregoing shares so delivered in substantially the form attached to this Agreement as Exhibit "A".

THIRD: The Trustee may execute the said voting trust certificate by the signature of such Trustee. The right, title and interest in and to the voting trust certificate issued hereunder may be transferred on the books of the Trustee, upon surrender of such certificate properly assigned by the registered holder thereof in person or by attorney duly authorized, according to the rules established for that purpose by the Trustee. Until a voting trust certificate is transferred on the books of the Trustee in accordance with the provisions contained herein and in the respective voting trust certificate, the Trustee shall not be obliged to recognize nor shall he be liable for not recognizing any person as the owner of any voting trust certificate issued hereunder other than the person in whose name the same shall be registered on his books.

FOURTH: The Trustee shall cause all shares of the Common Stock of the Company deposited with him hereunder to be transferred on the books of the Company into his name as Voting Trustee under this Agreement. The Trustee is authorized and empowered to cause any further transfer of shares to be made which may become necessary on the occurrence of any change of persons holding the office of Voting Trustee, as hereinafter provided.

FIFTH: The Trustee, or his successor in trust, shall have and be clothed with the sole and exclusive voting power of the stock standing in his name as such. He shall have power to vote the stock at every annual and special meeting of the stockholders, or as otherwise provided in the by-laws, during the term of the Trust Agreement, and shall have full and complete authority to vote upon any and all questions arising at any such meeting. The Trustee shall adopt reasonable rules for the calling and running of meetings and for the obtaining of waivers of notice.

SIXTH: During the term of this Agreement the Trustee shall possess and be entitled to exercise all the rights of the Stockholder of every name and nature, including without

limitation of the generality of the foregoing the right to vote or consent to amendment of the Certificate of Incorporation or merger or consolidation into or with any other corporation, or the sale of all or part of the assets of the Company. This voting trust shall continue and be applicable with respect to any securities of the Company having general voting rights received by the Trustee in substitution or exchange for, or as a distribution on, the shares of the Company deposited hereunder.

SEVENTH: It is agreed that all cash or property dividends or distribution shall be the property of the holder of the voting trust certificate for the shares of stock of the company upon which such dividends or distributions are made; and the Trustee, for himself and his successor in the trust, covenants and agrees that he will promptly pay or cause to be paid to or upon the written order of the registered holder from time to time of voting trust certificate issued hereunder any such cash or property dividends or distributions collected by the Trustee or his successor upon the shares of stock with respect to which such voting trust certificate was issued, except that securities of the Company having general voting rights shall be retained by the Trustee as provided in paragraph SIXTH.

In case the Trustee shall so receive and retain securities of the Company having general voting rights, the Trustee shall hold such securities and the certificates representing the same likewise subject to the terms hereof and shall issue voting trust certificates representing such securities to the registered holder of the then outstanding voting trust certificate representing stock entitled to such securities.

All dividends or other distributions to be made by the Trustee hereunder shall be distributed to the registered holder of the voting trust certificate hereunder on the date which determines as to the stockholder the ownership of such dividends or distributions. From time to time the Trustee shall execute and deliver or cause to be delivered to the Company proper dividend orders authorizing and directing the Company

to pay as aforesaid any and all dividends that may from time to time become due and payable upon the shares of stock of the Company deposited hereunder in respect of which voting trust certificates shall have been issued, to or upon the order of the registered holders respectively of such voting trust certificates entitled to receive the same. Upon the delivery by the Trustee to the Company of any dividend order as aforesaid, all further obligation or duty to the Trustee with respect to dividends referred to in such order shall terminate.

EIGHTH: The Trustee, in voting the stock deposited with him under this Agreement, shall elect as directors of the Company those who are in the discretion of the Trustee, qualified for such position. In case of vacancies in the board of directors due to resignations, death, incapacity or other causes, the Trustee shall make recommendation to the remaining directors, if any, as to the persons to be elected to fill such vacancies.

NINTH: The Trustee shall serve without compensation as Trustee but shall have the right to incur and pay reasonable expenses and charges and to employ and pay such agents and attorneys as said Trustee may deem necessary and proper in the performance of his duties under this Agreement, including, without limitation, the employment of attorneys in connection with any question or legal proceedings arising out of this Agreement. The Trustee shall be reimbursed for any such expenses or charges by the Stockholder with respect to the shares represented by the voting trust certificate issued and outstanding hereunder, and any amounts so owing to the Trustee may be deducted from the dividends or other moneys or property received by the Trustees upon the stock deposited hereunder and shall be a lien on shares deposited with them.

TENTH: In voting the shares, the Trustee shall use his best judgment from time to time to the end that affairs of the company shall be properly managed and the interest of the Stockholder safeguarded. It is agreed that the Trustee may

cause himself to be elected as a director of the Company and that a Trustee may act as an employee, officer or agent of the company and be compensated for his services in such capacity as fully as though he were not a Trustee. It is further expressly understood and agreed that no Trustee incurs any personal liability or responsibility by reasons of any error of judgment or of law with respect to any matter or thing done or omitted to be done under this Agreement or in the management of the affairs of the company or otherwise except for his own individual malfeasance.

ELEVENTH: Unless sooner terminated as herein provided, this Agreement shall continue in force until such time as the company redeems such shares, or ten years from the date first mentioned, upon which date it shall terminate in its entirety [unless it shall have theretofore been extended in the manner permitted by the Illinois Business Corporation Act].

Upon the termination of this Agreement, the Trustee, in exchange for and upon surrender of the voting trust certificate or certificates then outstanding and issued hereunder, shall, in accordance with the terms hereof, deliver or cause to be delivered to the registered holder of such voting trust certificates representing shares of stock of the Company of the kind and in the amount represented by the voting trust certificate and all cash and property accrued thereon, except such amounts as may be retained by the Trustee pursuant to paragraph NINTH.

TWELFTH: In the event of the death, resignation, or inability to act as Trustee of JEFFREY E. FREDERIKSEN, FRANK J. SEIFERT, shall become sole Trustee with all the rights, powers and obligations as Trustee hereunder.

In the event of the death, resignation or inability to act of the successor trustee the trust shall terminate forthwith and certificates of stock will be re-issued to each beneficial owner in his proportionate share.

THIRTEENTH: Any notice hereunder shall be sufficient if mailed to the holder of the voting trust certificate at his address as it appears on the books of the Trustee.

FOURTEENTH: This Agreement may be executed in one or more counterparts which together shall constitute a single instrument. An original of this Agreement shall be kept on file with the Trustees and a duplicate hereof shall be filed with the Company at its registered office in Waukegan, Illinois, and such duplicate shall be open to inspection by any stockholder of the Company or any holder of certificates of beneficial interest hereunder daily during business hours, as provided by law.

FIFTEENTH: This Agreement shall be binding upon and inure to the benefit of the Stockholder and his heirs, successors or assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

As Trustee:

/s/ Jeffrey E. Frederiksen
Jeffrey E. Frederiksen

Stockholder:

/s/ Edward T. Poloway
Edward T. Poloway

EXHIBIT A

VOTING TRUST CERTIFICATE

THIS IS TO CERTIFY, that EDWARD T. POLOWAY has deposited with the undersigned Trustee 90,000 shares of the Common Stock, $1.00 par value, of NORTH SHORE MARINE, INC., a Wyoming corporation, pursuant to a certain Voting Trust Agreement dated October, 1978, between EDWARD T. POLOWAY, and JEFFREY E. FREDERIKSEN, as Trustee. The above named holder accepts this certificate subject to all of the terms and conditions of said Agreement, and by such acceptance becomes a party to the same and shall be entitled to all the rights, privileges and interest of, and shall be subject to all the duties and obligations specified in, said agreement, which by reference is hereby made a part hereof as fully and to all intents and purposes as though the said Agreement were herein at length recited.

Upon termination of the trust with respect to any of the shares represented by this certificate in accordance with said Agreement, the above-named holder or his assigns shall be entitled to receive a certificate for such shares fully paid and nonassessable (and/or certificates for any other stock of NORTH SHORE MARINE, Inc., having general voting rights received by the Voting Trust Trustee under said Voting Trust Agreement in respect of such shares) upon the surrender of this certificate properly endorsed, in person or by attorney duly authorized, and upon payment to the Trustees for any tax or government charge imposed in connection with any transfer of stock represented by this certificate and for any other expenses incurred or paid by the Trustee in accordance with said Agreement.

This certificate and the interest represented hereby is transferable only on the books of the Trustee by the registered holder hereof, in person or by attorney, according to the rules

established from time to time by the Trustee, upon surrender of this certificate properly assigned and endorsed, and the Trustee may treat the registered holder as the owner hereof for all purposes.

IN WITNESS WHEREOF, the undersigned, as Trustee under the Voting Trust Agreement, have caused this Voting Trust Certificate to be executed this 14th day of October, 1978.

/s/ Edward T. Poloway
Edward T. Poloway

/s/ Jeffrey E. Frederiksen
Jeffrey E. Frederiksen
Trustee

AGREEMENT

This Agreement made this 14th day of October 1978, by and between EMERALD CITY CORPORATION, an Illinois Corporation (hereinafter "Company") and EDWARD T. POLOWAY (hereinafter "Employee") of Waukegan, Illinois.

WITNESSETH

WHEREAS, on the effective date of this agreement, Company is consummating the purchase of the assets of North Shore Marine, Inc. of which Employee is the sole stockholder.

WHEREAS, Company will be engaged as of the effective date of this agreement in the business of selling, repairing, storing, servicing boats in much the same way as was done by North Shore Marine, Inc. at its facility in Waukegan, Illinois.

WHEREAS, Company desires to retain Employee to assist in all areas of business in which the Company will be engaged; and

WHEREAS, the Employee is equally desirous of beginning employment with Company.

NOW, THEREFORE, in consideration of the above and foregoing premises and other good and valuable consideration as is hereinafter set forth, by mutual agreement of the parties hereto, the parties do hereby agree as follows:

EMPLOYMENT

1. Company does hereby agree to employ Employee and Employee agrees to said employment with Company pursuant to the terms and conditions hereinafter set forth.

EXHIBIT C

DUTIES OF EMPLOYEE

2. It shall be the duty of the Employee during the period of this agreement to devote his full time and best efforts to assist, guide and give his expertise in all areas of business in which the Company will be engaged and to operate within the goals, guidelines, directives, policies and procedures as communicated to Employee by Company and to do such other things as may be reasonably required by Company. The Employee shall not, during the term of this agreement, be engaged in any other business activity, whether or not such business activity is in the pursuit of gain, profit or other pecuniary advantage without first obtaining the written consent of Company; provided however Employee shall be allowed to participate in the Midwest Boat Show and various dealers' associations for the benefit of Company.

PAYMENT OF SALARY

3. Employee shall be paid $32,000.00 per year, in equal monthly installments, as his salary.

ADDITIONAL COMPENSATION TO EMPLOYEE

4. Employee shall receive as additional compensation for the services rendered on behalf of Company a commission on the sale of new boats, commissions on brokerage sales, and accessories in the amount of 20% of gross profit, as hereinafter defined.

"Gross Profit" is defined as sales price less the cost of the item sold, sales tax, labor included in sales price, freight charges, returns and allowances, and other similar type matters in the discretion of Company. The Company shall pay to Employee the commission due him (as determined by paragraph 4 above) from time to time, as determined by Company, but no less than annually during the term of this agreement, but only as such funds upon which commissions are computed are collected and deemed good.

PAYMENT OF CONSULTING FEE

5. Company shall pay Employee as and for a consulting fee the sum of $97,200.00, payable in equal monthly installments, for a period of thirty-six months; the first payment to commence one year from the date of this agreement. Said consulting fee shall be paid Employee for his efforts in planning, developing and staging the expansion of Company in the areas of land development, sales and general expansion of the business compatible with harbor expansion.

TERRITORY

6. Employee agrees to perform his duties hereunder in at the General Joseph A. Teece Pavillion and surrounding area in Waukegan, Illinois and at such other locations approved by Company.

TERM OF AGREEMENT

7. This agreement shall remain in full force and effect for five (5) years from the effective date of this agreement until terminated by either party.

CONSEQUENCES UPON TERMINATION

8. Upon termination of his employment, Employee shall immediately return to Company all sales materials then in his possession, including but not limited to lists of all Company's customers, lessees, merchandise, manuals, reports and other similar items.

9. Employee acknowledges and agrees that any commissions less advances which he may have earned prior to the termination of this agreement shall, if any, not then be due and payable but shall be paid to Employee within 120 days following said termination and shall not otherwise be due and payable to Employee unless and until said Employee has returned to Company all of the items hereinabove described in paragraph 8 and is not otherwise in violation of the terms and provisions of this agreement.

NON-COMPETITION AGREEMENT

10. The Employee acknowledges that but for Employee entering into this agreement, Company would not have purchased the assets of North Shore Marine, Inc., and that Company has expended substantial time and funds in the purchase of said assets in reliance upon Employee's representations made herein. Employee does hereby acknowledge, that as a result of his employment, he will continue to have access to and become acquainted with present and prospective customers of Company; their particular needs and requirements. Employee further acknowledges that Company will make Employee privy to Company's methods and techniques of doing business, its customers, their needs and requirements so as to fully and properly service said customers expeditiously and economically and, should Employee otherwise divulge said confidential information, it would irreparably interfere with and damage Company's interest. As a result of the matters herein stated, Employee does hereby agree as follows:

A. Employee shall not for a period of two (2) years following termination (for any reason) of his employment as an employee of the Company, whether pursuant to this agreement or otherwise, directly, or indirectly through services to any partnership of which he is a partner or employee or through any corporation or other entity in which he has any interest or by whom he is employed, induce any executive, administrative, sales, service or other employee of the Company or any of its affiliates to leave his employment or compete with the Company in the business for which the Company may have been engaged within one year prior to the termination of such employment.

B. Employee shall not, during the term of his employment or thereafter, disclose to others or use any of Company's confidential technical or other confidential business information. "Confidential technical or other confidential business information" means any information (including, but not limit-

ed to, lists of Company's vendors and customers names and addresses), which he has used, learned or contributed during the course of his employment, or at any time prior thereto regardless of whether it is in written or other tangible forms that (a) is not generally available to the public and (b) gives one who uses it an advantage over competition.

C. Employee shall not for a period of two (2) years after the termination of this agreement, work within 75 miles of Waukegan, Illinois, directly or indirectly own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by the Company within one year prior to the time of the termination of this agreement.

D. Company shall pay Employee as and for his agreement not to compete the sum of $54,000.00 payable in equal monthly installments, for a period of thirty-six months; the first payment to commence one year from the date of this agreement.

11. Without limiting the remedies to which the Company might otherwise be entitled for a breach of the agreements contained in this Non-Competition Agreement, the Company shall be entitled to enforcement of the following remedies.

A. In the event of actual, contemplated or threatened breach of this Non-Competition Agreement Company shall be entitled to an injunction restraining Employee from continuous or anticipated commission of such breach.

B. In the event that litigation shall be instituted to enforce or effectuate any provisions of this Non-Competition Agreement, the Company shall be entitled to tax as costs, in addition to all other costs otherwise taxable, a reasonable amount on account of attorneys' fees necessarily incurred in connection with such litigation, together with reimbursement for all witness's fees and expenses, including actual subsistence and

transportation, salary, wages paid or attributable to, or for the time necessarily spent by such witnesses in connection with such litigation.

The remedies provided for herein in the event of Employee's breach of this Non-Competition Agreement shall be cumulative and Company's pursuit of any one remedy shall not preclude Company from seeking enforcement of any and all other remedies available to it, whether provided for in this agreement or available to it as a matter of law or in equity.

12. The Employee does hereby agree that this Non-Competition Agreement shall be independent of any other provision in this agreement and any claim or cause of action by the Employee against the Company, be it found under the terms of this agreement or otherwise, shall not constitute a defense to the enforcement by the Company of the provisions of this Non-Competition Agreement.

13. Employee acknowledges and agrees that the foregoing restrictions in this Non-Competition Agreement are reasonable and necessary for the proper protection of the business and interest of Company and will not deprive the Employee of the means or opportunity for suitably supporting and maintaining himself and his family or for obtaining employment after the termination of this employment agreement.

WAIVER OF BREACH OR DEFAULT AND AMENDMENTS

14. (a) No waiver by any party to this contract of any breach or default of any of the terms or provisions hereof shall be effective or be binding upon such party unless the same shall be in writing and signed by or on behalf of such party, and no waiver by any party of any breach or default of any term or provision hereof shall be construed or held or shall be deemed to constitute a waiver of, consent to, or acquiescence in, any other breach or default of any other term or provision hereof or

waiver of acquiescence in or consent to any further or succeeding breach or default of the same term or provision of this agreement.

(b) No alteration, amendment, or modification of this agreement shall be effective or binding unless in writing and signed by both of the parties hereto.

(c) Only an officer of Company (other than EMPLOYEE) shall be authorized to act for Company in respect to this Agreement.

ENTIRE AGREEMENT

15. This constitutes the sole and entire agreement and understanding between the parties with respect to the matters covered thereby, there being no other promises, agreements, representations, warranties or other statements between them in respect to such matters not expressly set forth in the Contract and any and all promises, agreements, representations, warranties or other statements between them in respect to such matters not expressly set forth in the Agreement and any and all promises, agreements, representations, warranties and other statements, written or oral, made between the parties in respect to such matters prior to the execution hereof are hereby cancelled and superseded and shall be of no further force or effect.

SUCCESSORS TO COMPANY

16. This agreement shall be binding upon and inure to the benefit of any successor of the Company and any such successor shall be deemed substituted for the Company under the terms of this agreement. As used in this agreement, the term "successor" shall include any person, firm, corporation, or other business entity which at any time, whether by merger, purchase, or otherwise, acquires all or substantially all of the assets or business of the Company.

NOTICES

17. All notices or other communications required or permitted to be given pursuant to this agreement shall be in writing and signed by the party rendering such notice and shall be deemed delivered upon hand delivery or deposit thereof in the mails with prepaid postage for first class, addressed to each party hereto as each party hereto shall designate from time to time in writing by the manner herein set forth.

CAPTIONS

18. The headings, titles and subtitles herein are inserted for convenience of reference only and shall not control or affect the meaning or construction of any of the provisions hereof.

GOVERNING LAW

19. This agreement shall be governed and construed in accordance with the laws of the State of Illinois.

EXHIBITS

20. Each Exhibit attached hereto shall be incorporated into and be a part of this agreement.

HEALTH INSURANCE AND VACATIONS

21. Employee shall be entitled to and Company shall pay for hospitalization insurance and Employee shall be entitled to four (4) weeks vacation per year with pay; said vacation to be taken so as not to interfere with the vacation schedules of others as determined by Company. If said vacation is not taken in one year period, it shall not be cumulative.

DEATH AND DISABILITY

22. Should Employee die, or become totally and permanently disabled prior to the time all consulting fees and non-competition payments are paid in full, then in any such event:

A. In the case of total and permanent disability, said sums still unpaid will continue to be paid until paid in full.

B. In the case of death, all sums still unpaid as herein provided shall be paid as directed in writing by Employee and in the absence of written direction, to Employee's estate.

INDEMNIFICATION

23. Simultaneously herewith, Employee, as sole shareholder of North Shore Marine, Inc., has entered into a certain agreement causing said corporation to sell certain of its assets to Company and therein, as sole shareholder, Employee has made certain representations and warranties upon which Company relied in the purchase of said assets. Employee, as sole shareholder, agreed at paragraph 9 of said agreement, to hold Company harmless and indemnify Company in the event of any losses to Company, all as more fully set forth in said paragraph 9, which is incorporated herein and by reference made a part thereof.

In the event that the liabilities of North Shore Marine, Inc. exceed the sum of $160,000.00 or the violation of any representation or warranties made by Employee, as sole shareholder, cause loss or damage to Company, then, in any such event, Employee does hereby agree and consent to allow company to set-off against funds due Employee for consulting fees and non-competition agreements said liability in excess of $160,000.00 and losses caused by said breach of representations and warranties.

IN WITNESS WHEREOF, the parties have executed this agreement effective on the date first above stated.

EMERALD CITY CORPORATION

/s/ Jeffrey E. Frederiksen
By: President

/s/ Edward T. Poloway
Edward T. Poloway

I hereby guarantee payment of the consulting fees and non-competition payments due from Emerald City Corporation to Seller in accordance with the terms of this agreement.

/s/ Jeffrey E. Frederiksen
Jeffrey E. Frederiksen

MANAGEMENT AGREEMENT

THIS AGREEMENT, made and entered into this 14th day of October, 1978 by and between NORTH SHORE MARINE, INC. party of the first part (hereinafter referred to as "Owner"), and EMERALD CITY CORPORATION party of the second part, (hereinafter referred to as the "Agent"):

WITNESSETH:

1. The Owner hereby engages the Agent as sole and exclusive Managing Agent to manage and operate the Marina facilities known as The Joseph A. Teece Pavilion and adjoining area all of which is described in a certain lease between the Waukegan Port District and Owner ("Business"), upon the conditions and for the term and compensation herein set forth.

2. Term of this agreement shall be for a five year period from the date upon which it is executed.

3. The Agent hereby accepts such employment and agrees to perform the services pertaining to said employment and to manage and operate said Business and premises to the best of its ability in a faithful and diligent manner, and without limiting the generality of the foregoing, the Agent agrees to perform, and the Owner hereby expressly authorizes and empowers the Agent to perform all duties, responsibilities, obligations incidental to the management of the Business including but without limitation, the repair and restoration of the pavilion, which duties, responsibilities and obligations shall be exercised by Agent in its sole discretion.

Without limiting the foregoing, the Agent shall have the following rights:

(a) To cancel, amend, enter into any rental agreements.

EXHIBIT D

(b) To collect and use all reasonable efforts to collect all income therefrom, but nothing herein contained shall be deemed a guarantee by the Agent for the collection of said income.

(c) To employ, discharge and pay (from the funds of the Owner) as the Owner's Agent, all servants, employees and contractors necessary or desirable to be employed in the care, security, management and operation of the Business and also to pay all salaries, legal fees, accounting fees and any and all other expenses incident to the operation of the Business.

(d) To purchase or lease on behalf of the Owner all equipment, tools, appliances, materials and supplies necessary or desirable for the care, maintenance or operation of the Business.

(e) To contract and pay on behalf of the Owner and to supervise the landscape maintenance, snow removal and the making of all repairs, and decorating of the Business.

(f) To pay on behalf of the Owner all charges for water, gas and electricity and/or other utility charges and other services and commodities necessary or desirable in the care, operation or maintenance of the Business.

(g) To advertise the Business at the expense of the Agent.

(h) To do any and all things necessary or desirable for the due and proper care, protection, maintenance, operation and management of the Business.

(i) The Agent shall, without additional compensation, prepare and file all returns and other documents required under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act or any similar Federal or State legislation, and all withholding tax returns required to be paid under the Federal Insurance Contribution Act

and the Federal Unemployment Tax Act or any similar Federal or State legislation and all withholding taxes from the Owner's funds.

(j) To maintain accounts, with current entries, of all receipts and expenditures incident to the management of the Business and the performance of this contract, which accounts, together with all records, correspondence, files and other documents relating to the operation and management of the Business shall be paid for by the Agent. Such accounts, records, correspondence, files and other documents shall at all times be open to the inspection of the Owner or of any of its officers of duly authorized agents, on reasonable notice.

(k) To furnish monthly to the Owner a detailed statement of all receipts and disbursements for each month. Such statement will be furnished on or before the fifteenth (15th) day of each month for the preceding month. Such statement shall show the status of collections and shall be supported by cancelled checks, vouchers, duplicate invoices, etc. covering all items of income and expense, which shall be kept in the Agent's office and be available for inspection of Owner's representatives at all times, on reasonable notice. The Agent shall also furnish to Owner, monthly (not later than the twentieth of the month), an operating statement showing the income and expenses for the preceding month and the year to date.

(l) To pay on behalf of Owner all expenses relating solely to the operating functions of the Business including telephone expense, operating forms, such as operating and payroll account checks, rent bills, accounting forms, stationery, leases, etc. as related solely to the functions of operating the Business.

(m) The Owner shall furnish Agent with adequate office facilities on the Business premises without charge.

4. All sums received from the Business shall be deposited from time to time as collected by the Agent at the Bank of Waukegan, Waukegan, Illinois.

5. The Agent shall have the right at all times to secure all insurance policies with respect to the Business and its operation. The Owner agrees that the Agent shall be included as an insured in the policies covering general liability, public liability and workmen's compensation insurance.

6. The Owner agrees to pay the Agent, as compensation for management services hereunder, an amount equal to fifty percent (50%) of the gross income derived from the operation of the Business. Owner acknowledges that the efforts and management of Agent are necessary and essential to the preservation of the assets and other values of Owner, and Owner understands and agrees that Agent's management fees hereunder will, in all probability, eliminate any funds being paid to Owner by Agent during the term hereof.

7. Neither party hereto shall have the right to assign this Agreement without the written consent of the other party.

8. All written notices to be given to the Owner may be addressed and mailed by United States certified mail, to the Owner at the Business location until notified otherwise and all written notices to be given to Agent may be addressed and mailed by United States certified mail, to the Agent at, c/o Frank J. Seifert at 104 Kenilworth West, Prospect Heights, Illinois 60070.

IN WITNESS WHEREOF, the parties hereto have executed this agreement pursuant to the authorization of their respective Boards of Directors.

NORTH SHORE MARINE, INC.

ATTEST: BY:

/s/ Edward T. Poloway
Secretary President

EMERALD CITY CORPORATION

ATTEST: BY:

/s/ Jeffrey E. Frederiksen
Secretary President